

5-1-2014

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### Repository Citation

Sandi S. Varnado, *Your Digital Footprint Left Behind at Death: An Illustration of Technology Leaving the Law Behind*, 74 La. L. Rev. (2014)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol74/iss3/7>

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# Your Digital Footprint Left Behind at Death: An Illustration of Technology Leaving the Law Behind

Sandi S. Varnado\*

## INTRODUCTION

“Death in the digital age is a lot more complicated than it used to be.”<sup>1</sup> Americans spend a substantial portion of their waking hours on some sort of electronic device, with a large amount of that time spent online.<sup>2</sup> Recent studies reveal that an estimated 85% of American adults use the Internet<sup>3</sup> and spend an average of 23 hours a week (or 14% of the time available in a week) online.<sup>4</sup> The figures are even higher for young American adults. Ninety-eight percent of 18 to 29

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\* Associate Professor of Law, Loyola University New Orleans College of Law. I would like to thank Loyola University New Orleans College of Law for the research grant to support the writing of this Article. I would also like to thank several people who read and commented constructively on drafts of this article: Hillary Allen, Andrea Armstrong, John Blevins, William R. Corbett, Johanna Kalb, and Monica Wallace. Additionally, I would like to thank Steven Gallo, Claire Noonan, and Stephanie Riemer for their excellent research assistance.

1. Patrick Marshall, *Digital Estate Planning Often Forgotten*, SEATTLE TIMES (Jan. 7, 2012, 8:00 PM), [http://seattletimes.com/html/business/technology/2017171847\\_pfdigitalestates08.html](http://seattletimes.com/html/business/technology/2017171847_pfdigitalestates08.html) [<http://perma.cc/T8GQ-U5PH>] (archived Mar. 4, 2014).

2. One recent article indicates that Americans spend more than 28 hours per month on the Internet on a computer, nearly 6 hours on online videos, more than 5 hours on mobile videos, and nearly 6 1/2 hours on a gaming console. Sarah Perez, *Nielsen: TV Still King in Media Consumption; Only 16 Percent Of TV Homes Have Tablets*, TECH CRUNCH (Jan. 7, 2013), <http://techcrunch.com/2013/01/07/nielsen-tv-still-king-in-media-consumption-only-16-percent-of-tv-homes-have-tablets/> [<http://perma.cc/3VKB-RDDQ>] (archived Mar. 4, 2014). A different study notes that American adults spend a little more than 5 hours per day on digital media. Alexis Kleinman, *Americans Will Spend More Time on Digital Devices Than Watching TV This Year: Research*, HUFFINGTON POST (Aug. 1, 2013), [http://www.huffingtonpost.com/2013/08/01/tv-digital-devices\\_n\\_3691196.html](http://www.huffingtonpost.com/2013/08/01/tv-digital-devices_n_3691196.html) [<http://perma.cc/474A-U3ZV>] (archived Feb. 24, 2014).

3. *Internet Use Over Time*, PEW INTERNET, <http://www.pewinternet.org/data-trend/internet-use/internet-use-over-time> (last visited Mar. 12, 2014) [<http://perma.cc/QA4M-VDCP>] (archived Mar. 12, 2014). Close to 300 million total Americans use the Internet. Chelsea Ray, *Til Death Do Us Part: A Proposal for Handling Digital Assets After Death*, 47 REAL PROP. TR. & EST. L.J. 583, 586 (2013) (putting the number at 289,309,000).

4. David Mielach, *Americans Spend 23 Hours Per Week Online, Texting*, BUS. NEWS DAILY (Jul. 2, 2013, 12:14 PM), <http://www.businessnewsdaily.com/4718-weekly-online-social-media-time.html> [<http://perma.cc/3B2U-5ACX>] (archived Feb. 24, 2014). See also Jamie P. Hopkins, *Afterlife in the Cloud: Managing a Digital Estate*, 5 HASTINGS SCI. & TECH. L.J. 209, 217 (2013) (stating that the average U.S. internet user spends almost 68 hours per month online).

year olds and 92% of 30 to 49 year olds use the Internet.<sup>5</sup> More than 75% of Internet users check their e-mail, texts, Facebook, and Instagram every day.<sup>6</sup> Almost inadvertently, America has begun to lean more and more toward a predominantly digital culture,<sup>7</sup> and many predict that this trend is going to continue.<sup>8</sup> This interaction with computers<sup>9</sup> has impacted American society and the law, and in many circumstances, the law, still set in the pen and ink era, simply fails to

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5. *Internet Use Over Time*, *supra* note 3. Although recent studies show that 92% of Americans have an online presence by the time they are two years old, Maria Perrone, Comment, *What Happens When We Die: Estate Planning of Digital Assets*, 21 *COMMLAW CONSPECTUS* 185, 185 (2012), those over the age of 65 are a fast-growing population of online users. Gerry W. Beyer & Naomi Cahn, *Digital Planning: The Future of Elder Law*, 9 *NAELA J.* 135, 136 (2013) [hereinafter Beyer & Cahn, *Digital Planning*]. The latter group also spends more money on technology and online shopping than any other demographic. David Goldman & Charles Jamison, *The Future of Estate Planning: The Multigenerational Life Plan*, 5 *EST. PLAN. & COMMUNITY PROP. L.J.* 1, 9 (2012).

6. Mielach, *supra* note 4.

7. EVAN CARROLL & JOHN ROMANO, YOUR DIGITAL AFTERLIFE: WHEN FACEBOOK, FLICKR AND TWITTER ARE YOUR ESTATE, WHAT'S YOUR LEGACY? 2 (2011).

8. Frank S. Baldino, *Estate Planning and Administration for Digital Assets*, *MD. B.J.*, Nov./Dec. 2012, at 28, 29; Tom H. Cantrill, Jean Gordon Carter, J. William Gray, Jr., Katherine E. Ramsey & Michael Anderson, *Tweeting from Beyond: What Happens to Your Digital Assets When You Are Gone?*, *LEXOLOGY* (Aug. 22, 2012), <http://www.lexology.com/library/detail.aspx?g=073d2e08-93c2-414e-acee-144bc058bef1> [<http://perma.cc/WD9V-VNML>] (archived Feb. 24, 2014) (“[W]ith each passing year more of your life goes digital and in increasingly complex ways.”); John Conner, Comment, *Digital Life After Death: The Issue of Planning for a Person’s Digital Assets After Death*, 3 *EST. PLAN. & COMMUNITY PROP. L.J.* 301, 314–15 (2011) (after providing statistics from 2010, claiming that “[p]erhaps the most interesting thing about these numbers is that they continue to grow, and the pace at which they are growing has not even begun to decline”).

9. In the interest of brevity, this Article uses the term “computer” in the vernacular sense here and throughout the rest of the Article. From here forward, this term shall include desktop computers, laptop computers, tablets, and smartphones, as well as storage hardware like external hard drives, and computer media like CDs, DVDs, flash drives, etc.

keep pace with technology.<sup>10</sup> Such is the case with regard to one's digital footprint at death.<sup>11</sup>

A "digital footprint," for purposes of this Article, is broadly defined to collectively include any and all files and accounts, whether stored locally or online.<sup>12</sup> This includes any digital item such as a person's digital information, digital assets, digital accounts, and digital estate.<sup>13</sup> Digital items may simply be the means by which to access

10. Noam Kutler, *Protecting Your Online You: A New Approach to Handling Your Online Persona After Death*, 26 BERKELEY TECH. L.J. 1641, 1651 (2011) ("The use of the Internet has exploded in recent years, leaving the law to catch up with many new issues."); Gerry W. Beyer, *Estate Planning in the Digital Age* 1 (2013) (working paper), available at <http://ssrn.com/abstract=2166422> ("[T]he pace of technology is faster than the law can adapt."); Stephen S. Wu, *Digital Afterlife: What Happens to Your Data When You Die?* 4 (2013), available at <http://dataedge.ischool.berkeley.edu/2013/pdf/digital-afterlife-white-paper.pdf> [<http://perma.cc/7UBU-S7FS>] (archived Feb. 24, 2014) ("Technology is always far ahead of the progress of the law . . .").

11. Rachel Ehrenberg, *Computer Scientists Grapple with How to Manage the Digital Legacy of the Departed*, SCIENCE NEWS (June 10, 2013, 10:19 AM), [http://www.sciencenews.org/view/generic/id/350909/description/Computer\\_scientists\\_grapple\\_with\\_how\\_to\\_manage\\_the\\_digital\\_legacy\\_of\\_the\\_departed](http://www.sciencenews.org/view/generic/id/350909/description/Computer_scientists_grapple_with_how_to_manage_the_digital_legacy_of_the_departed) [<http://perma.cc/EB44-MHJC>] (archived Feb. 24, 2014) ("But communication and privacy laws have yet to catch up with technology."); CARROLL & ROMANO, *supra* note 7, at 57 ("[O]ur cultural and legal mechanisms for passing along assets haven't changed to include digital assets."). Of course, this issue is not limited to America. See, e.g., Tobi Cohen, *Lawyers Raise Questions About Digital Data Rights After the Owner's Death*, CANADA.COM (Aug. 20, 2013, 4:48 PM), <http://o.canada.com/news/national/lawyers-raise-questions-about-digital-data-rights-after-the-owners-death/> [<http://perma.cc/EZ5G-9XSK>] (archived Feb. 24, 2014) (discussing the issue from a Canadian perspective); Gerry W. Beyer, *Who Gets Access to Your Facebook When You Die?*, WILLS, TR. & EST. PROF BLOG (Aug. 20, 2013), [http://lawprofessors.typepad.com/trusts\\_estates\\_prof/2013/08/who-gets-access-to-your-facebook-when-you-die.html](http://lawprofessors.typepad.com/trusts_estates_prof/2013/08/who-gets-access-to-your-facebook-when-you-die.html) [<http://perma.cc/8A4G-M6HG>] (archived Feb. 24, 2014) (discussing Asia and Europe).

12. I have chosen the term "digital footprint" purposefully and defined it herein to avoid inadvertently narrowing the scope of this Article by the use of such terms as "digital information," "digital asset," "digital account," or "digital estate."

13. "Digital information" has been defined as "representative of (or enables control over) traditional forms of intangible personal property such as bank and brokerage accounts, stocks, bonds, mutual funds and other intangible investments for which the record-keeping, reporting or management functions are online, either in part or in whole." Christopher D. Fidler, *Tools for Digital Assets and Digital Information*, LEXOLOGY (June 5, 2013), <http://www.lexology.com/library/detail.aspx?g=00651ac6-d3b0-480a-adf8-a73f868f7eab> [<http://perma.cc/9HT2-PCNA>] (archived Feb. 24, 2014). As commentators have recognized, there is no current definition of "digital assets" that is clear and universal. Conner, *supra* note 8, at 303; Kristina Sherry, Comment, *What Happens to our Facebook Accounts When We Die?: Probate Versus Policy and the Fate of Social-Media Assets Postmortem*, 40 PEPP. L. REV. 185, 207 (2012) (noting that the term "is already vague" and "is continuously broadening to incorporate once-tangible assets now undergoing complete digitization, as well as previously unforeseen cyber innovations"); Perrone, *supra* note 5, at 188 (explaining that there is no universal definition of the term); Beyer, *supra* note 10

other digital items, like e-mail, for example, or they may be collections (of photographs, videos, documents, books, music, or other things), social media accounts, or other materials that are not valuable *per se* but are irreplaceable from a sentimental standpoint. Digital items may be financial in nature from a personal or business standpoint. Although one may not realize or appreciate the value of his digital footprint, it could comprise a significant portion of his entire patrimony. In fact, a recent study showed that the average American values his digital footprint at nearly \$55,000.<sup>14</sup> Digital items can also be quite unusual, such as the \$17,000 virtual sword used in an online game.<sup>15</sup>

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(noting that there is no well-established definition). Further, others have offered different definitions of the term, with varying scope in each. *See, e.g.*, Gerry W. Beyer & Naomi Cahn, *When You Pass On, Don't Leave The Passwords Behind*, PROB. & PROP., Jan./Feb. 2012, at 3 [hereinafter Beyer & Cahn, *When You Pass On*]; Tim Grant, *'Digital Assets': The New Frontier for Estate Planning*, PITTSBURGH POST-GAZETTE (May 13, 2013, 4:00 AM), <http://www.post-gazette.com/stories/business/legal/digital-assets-the-new-frontier-for-estate-planning-687401> [<http://perma.cc/4G8Y-Y845>] (archived Feb. 24, 2014) (defining “digital assets” as “any work or possessions stored on a computer and the Internet”); Rochelle L. Haller, *Web of Estate Planning Considerations for Digital Assets*, LEXOLOGY (Apr. 26, 2013), <http://www.lexology.com/library/detail.aspx?g=c301f729-258b-42a4-bf8b-673b230a0698> [<http://perma.cc/Y6EL-QCKF>] (archived Feb. 24, 2014) (defining “digital assets” as “electronic content; information or media; and the right to use that content, information, or media”); Fidler, *supra* (defining “interests in property capable of being divided or distributed, such as digital media in the form of text, photograph, music, and video files, websites and domain names, and to the extent legal ownership can be established, web-based media including e-mail accounts, social media and blogs”); Evan Carroll et al., *Digital Assets: A Clearer Definition*, DIGITAL EST. RESOURCE (Jan. 30, 2012), <http://commens.org/13IjL5> [<http://perma.cc/9HMZ-Z92M>] (archived Feb. 24, 2014) (defining “digital assets” as the actual files stored in digital form). “Digital account” has been defined as access rights to digital accounts. *Id.* “Digital estate” has been defined as a person’s collective digital assets. Conner, *supra* note 8, at 305. *See also* Perrone, *supra* note 5, at 186 (defining “digital estate” as the culmination of digital assets). The term “digital footprint” is obviously broader than “digital information.” It is also broader than “digital asset,” although the two are similar, particularly when comparing the broadest definition of the former. It is roughly equivalent to “digital estate” except that the latter’s incorporation of the term “digital asset” in its definition generates scope issues. The intent in using “digital footprint” and the definition provided for it is to include all items that would also qualify under the definitions of “digital information,” “digital asset,” “digital account,” and “digital estate.”

14. Steven Maimes, *Managing Your Digital Afterlife: Cyber Footprint, Ownership, and Access*, TRUST ADVISOR (Jan. 28, 2013), <http://thetrustadvisor.com/tag/digital-estate-planning> [<http://perma.cc/5BW3-QLWJ>] (archived Mar. 4, 2014). American Internet users have more digital items than the average world user. Hopkins, *supra* note 4, at 221.

15. Arden Dale, *More Estate Plans Account for 'Digital Assets'*, WALL ST. J. (June 13, 2013, 9:19 AM), <http://online.wsj.com/article/SB10001424127887323734304578543151391292038.html>.

A recent survey indicates that a majority of Americans have not planned for their digital footprints upon death.<sup>16</sup> For most people, doing so is “a forgotten and neglected death-related obligation.”<sup>17</sup> Even for those who are aware of and remember the issue, there are other reasons for their lack of planning. Some are nervous about the idea of sharing all of their log-in information prior to death.<sup>18</sup> Some do not value their digital items enough to incorporate them into an estate plan.<sup>19</sup> For others, “[t]he sheer magnitude of [their] digital lives can overwhelm [them] into inaction.”<sup>20</sup>

The failure to include one’s digital footprint in an estate plan renders the plan incomplete. Lack of planning, in turn, means that one’s successors cannot know with any certainty what the decedent would have wanted to happen to his digital footprint, which could leave digital items “adrift in cyberspace.”<sup>21</sup> The interests of various groups of people lead to competing policies about whether access to a

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16. Catey Hill, *5 Steps to Creating Your Digital Estate Plan*, NEXTAVENUE (Apr. 12, 2013), <http://www.nextavenue.org/article/2012-05/5-steps-creating-your-digital-estate-plan> [<http://perma.cc/6NTY-D93U>] (archived Feb. 24, 2014) (stating that 63% have not made a plan for their digital footprint); Goldman & Jamison, *supra* note 5, at 11 (stating that 57% have not). Some polls indicate that this number is slightly smaller for “high-net-worth people.” Paul Sullivan, *Leaving Behind the Digital Keys to Financial Lives*, N.Y. TIMES (May 24, 2013), [http://www.nytimes.com/2013/05/25/your-money/forgotten-in-estate-planning-online-passwords.html?nl=todays-headlines&emc=edit\\_th\\_20130525&r=2&](http://www.nytimes.com/2013/05/25/your-money/forgotten-in-estate-planning-online-passwords.html?nl=todays-headlines&emc=edit_th_20130525&r=2&) [<http://perma.cc/45HU-SM5K>] (archived Feb. 24, 2014). For that matter, most Americans do not plan for their death at all. The majority of Americans have not executed a will. Grant, *supra* note 13 (claiming that 61% of Americans have not made a will at their death); Sherry, *supra* note 13, at 207 (claiming the number is 58%).

17. Maimes, *supra* note 14. *See also* Beyer & Cahn, *Digital Planning*, *supra* note 5, at 149 (explaining that many clients have never considered estate planning for their digital footprints); Conner, *supra* note 8, at 308 (“People simply do not think about their digital assets . . .”).

18. Beyer & Cahn, *Digital Planning*, *supra* note 5, at 150; Sullivan, *supra* note 16.

19. Michael Walker & Victoria D. Blachly, *Virtual Assets*, ST0003 ALI-ABA 175, 177 (2011).

20. Rev. Amy Zietlow & Naomi Cahn, *What Does Managing a Loved One’s Digital Legacy Look Like?*, HUFFINGTON POST (June 24, 2013, 4:27 PM), [http://www.huffingtonpost.com/rev-amy-zietlow/what-does-managing-a-love\\_b\\_3461477.html](http://www.huffingtonpost.com/rev-amy-zietlow/what-does-managing-a-love_b_3461477.html) [<http://perma.cc/3LR3-2D3P>] (archived Feb. 24, 2014). *See also* Perrone, *supra* note 5, at 194 (“[T]he sheer amount of work involved in tracking every online account and password presents a task that many people consider too daunting to undertake.”); Ehrenberg, *supra* note 11.

21. Ray, *supra* note 3, at 583. *See also* Samantha Haworth, *Laying Your Online Self to Rest: Evaluating the Uniform Fiduciary Access to Digital Assets Act*, U. MIAMI L. REV. (forthcoming 2014) (manuscript at 2), *available at* <http://ssrn.com/abstract=2269093> (“When internet users die without planning for their digital lives, families and estate executors are left to guess the users’ wishes.”).

decedent's digital footprint should be allowed or denied.<sup>22</sup> The law does not help. Louisiana, like most states, has no specific legislation in place to govern a decedent's digital footprint, leaving traditional legal principles to govern technological advancements that did not exist and were probably not even anticipated at the time the laws in question were written. Thus far, the problems have not reached epic proportions, but that day is coming. As more transactions occur online, fewer hard copies exist. Instead, the "[d]ocuments once found in wallets, desks, and safety deposit boxes are now accessed mainly through email and website accounts."<sup>23</sup> And as environmental consciousness finds its way more and more into corporate America and more customers are encouraged to opt for paperless transactions, digital items will continue to grow in number and value.<sup>24</sup> As that happens and as the most prolific users of online services start to die in greater numbers,<sup>25</sup> the digital footprint issue will become a serious problem.

With this background in mind, this Article is organized as follows: Part I provides an overview of some of the most common digital items, including e-mail, sentimental items (like collections of photographs, videos, documents, books, and music, as well as social media accounts), and financial digital items. Part II assesses the various interests triggered by the digital footprint issue. One such interest is efficient estate administration, which could affect a decedent's succession representative,<sup>26</sup> his successors, and in certain

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22. Competing interests include (1) efficient estate administration (which affects decedents' succession representatives, their successors, and in some situations, their donees and the donees' successors by gratuitous title), (2) the privacy interests (of decedents and those with whom they communicated), (3) the right to information of those left behind (in some situations), (4) the contractual rights of online service providers, and (5) the historical preservation interests of society. *See infra* Part II.

23. Molly Wilkens, Comment, *Privacy and Security During Life, Access After Death: Are They Mutually Exclusive?*, 62 HASTINGS L.J. 1037, 1039 (2011).

24. Grant, *supra* note 13; David H. Ogwyn, *Digital Asset Protection and Planning*, LA. B.J., Oct./Nov. 2012, at 208, 209 ("Service providers, including banks, insurance companies, and various utility agencies, encourage their customers to switch to paperless statements and online account management.").

25. Kutler, *supra* note 10, at 1644 ("[G]iven the relatively young age of the average internet user, many questions regarding death and rights of succession have yet to reach the critical mass necessary to garner public attention—but they will soon."); Sherry, *supra* note 13, at 213 ("[N]ot enough people—especially the young and the will-less—have died to call attention to the questions raised by dead persons' unnamed social-media accounts.").

26. This Article uses the term "succession representative" to connote the person who is in charge of administering the decedent's estate. *See generally* LA. CODE CIV. PROC. art. 2826 (2014). Generally, in Louisiana, that person is an executor named by the decedent in his testament, and in other cases, an administrator. *See generally* FRANK L. MARAIST, CIVIL PROCEDURE SPECIAL PROCEEDINGS § 5.8, *in* 1A LOUISIANA CIVIL LAW TREATISE 103–08 (2005).

circumstances in Louisiana, his donees and their successors by gratuitous title. Yet the privacy interests of the decedent and those with whom he communicated must be considered as well, along with the interests of those left behind. Also interested in the issue are the online service providers (OSPs) that contracted with the decedent when he created certain digital assets in his digital footprint, as well as society, which has an interest in the decedent's digital footprint from a historical preservation standpoint. Some of these interests weigh in favor of allowing access to a decedent's digital footprint; others do not. Part III addresses the Gordian knot of overlapping and complicated legal analyses that the digital footprint issue triggers, including (1) the status of some or all digital items as property, such that they may be transferred at death; (2) the effect of the OSPs'<sup>27</sup> terms of service (TOS)<sup>28</sup> on the transfer of and access to certain digital items; and (3) the effect of certain federal privacy statutes. Part IV details the Louisiana approach to the digital footprint issue, which is, as of now, only estate planning. Louisiana, like the majority of other states,<sup>29</sup> has no legislation or jurisprudence to specifically address the digital footprint issue. Part V analyzes the various potential resolutions to the issue (including company policy change, *ad hoc* judicial action, a federal statute, a state statute, and a uniform act), and it highlights the deficiencies of each. Finally, Part VI proposes that both federal and state action is required to effectively handle the multitude of legal issues triggered by the digital footprint. On the federal level, it suggests that Congress (1) amend existing federal statutes to ensure that one accessing a decedent's digital footprint is not unintentionally breaking the law and (2) enact a federal enabling statute to mandate that OSPs follow the digital footprint laws of the states. On the state level, Part VI

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27. "Each online service provider has its own terms of service—the legal mumbo-jumbo you click through when you open your account . . ." Eleanor Laise, *Protect Digital Assets After Your Death*, KIPLINGER (May 2013), <http://www.kiplinger.com/article/retirement/T021-C000-S004-protect-digital-assets-after-your-death.html> [<http://perma.cc/7ZX4-A3LW>] (archived Feb. 24, 2014). The TOS always exist and vary from provider to provider, making it nearly impossible for one with a large digital footprint to know his rights. Perrone, *supra* note 5, at 190; Kutler, *supra* note 10, at 1648–49. Also, many sites unilaterally amend their terms on a regular basis, creating quite a burden for a user who tries to stay abreast of his rights. *Id.*

28. They are also sometimes referred to as "clickwrap agreements," Beyer & Cahn, *Digital Planning*, *supra* note 5, at 37, or "browsewrap agreements," Kutler, *supra* note 10, at 1646.

29. Grant, *supra* note 13. See also Naomi Cahn, *Postmortem Life On-Line*, PROB. & PROP., July/Aug. (2011), at 36, 37–38; Nicole Schneider, *Social Media Wills—Protecting Digital Assets*, J. KAN. B. ASS'N, June 2013, at 16, 16 ("Currently, there exists almost no legally binding precedent for including digital assets as part of an estate without explicit directions in a will or trust."); Haworth, *supra* note 21, at 6 ("Reported case law on how these different types of digital assets are being accessed and distributed through the probate system is nearly nonexistent at this time.").



offers a detailed statutory scheme to govern the digital footprints of both testate and intestate decedents. Ultimately, it suggests that Louisiana should avoid the “one-size-fits-all” approach to the digital footprint issue followed in existing legislation in other states and in the draft of the Uniform Fiduciary Access to Digital Assets Act. Instead, it suggests that Louisiana consider the strength of interests triggered by different digital items and enact legislation that appropriately reflects that consideration by treating each digital item differently.

### I. DIGITAL ITEMS IN A DIGITAL FOOTPRINT

Because one’s digital footprint is defined so broadly, one commentator aptly noted that its scope is “utterly mindboggling.”<sup>30</sup> Digital items can be stored locally or online or both. Some, like e-mail, can be used to access other digital items. Some hold sentimental value, while others are better classified as financial in nature.<sup>31</sup>

#### *A. The Digital Item Used to Access Other Digital Items: E-mail Accounts*

E-mail, a unique and personal identifier, is, of course, in digital form itself. Americans now use their e-mail accounts in a variety of ways, including the traditional way of communicating with others. Yet, an e-mail account also serves as the means to reset passwords to other online accounts, and thus, it is an important index of most online activity.<sup>32</sup> As a result, one’s e-mail account has been referred to as the master key to locating and accessing many other digital items.<sup>33</sup> After all, “[o]nline statements, notifications, messages, paperless bills etc., will all come through to the decedent’s emails. Moreover, the decedent’s address book and calendar are often tied to or stored within the email account.”<sup>34</sup> Therefore, access to a decedent’s e-mail account is extremely important. Without it, a succession representative may be

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30. Ray, *supra* note 3, at 586. *See also* Beyer, *supra* note 10, at 2 (stating that the number of digital items one person owns or controls is “virtually endless”).

31. Note that this classification scheme is not an exact science because—as will become obvious—some digital items arguably belong in more than one category. Note also that other legal scholars have grouped them differently. Some have grouped them as “personal, social media, financial, and business.” *See* Cahn, *supra* note 29. Others have grouped them as stored locally or stored elsewhere and then included sub-groups within each group. *See* Sherry, *supra* note 13, at 195.

32. Carroll et al., *supra* note 13.

33. Maimes, *supra* note 14; Sherry, *supra* note 13, at 196.

34. Neeli G. Shah, *Disposition of Digital Assets: Reasons for Digital Estate Planning*, LEXOLOGY (May 8, 2012), <http://www.lexology.com/library/detail.aspx?g=220d8c0f-b689-4bbf-95bf-67a1ad741c14> [<http://perma.cc/9GSS-WCC8>] (archived Feb. 24, 2014).

unable to obtain information about a decedent's other digital items, which may, in turn, mean that the succession representative will be unaware of their existence.<sup>35</sup>

Trillions of e-mails are sent each year,<sup>36</sup> and billions are sent daily.<sup>37</sup> Seventy-five percent of working American adults have at least one personal e-mail address, and 59% have at least one work e-mail address.<sup>38</sup> Although some e-mail programs are local, many of the most popular e-mail services, like Gmail, Hotmail, and Yahoo!,<sup>39</sup> are web-based, meaning that copies of the e-mails are not downloaded onto the computer and the content in the accounts is accessible only through the accounts themselves.<sup>40</sup>

### *B. Digital Items of Sentimental Value: Collections and Social Media Accounts*

An e-mail account can also be used to unlock one's sentimental digital assets, including collections of photographs and videos, documents, books, music, and other collections that can be stored either on a computer or through an online account. It can also be used to unlock social media accounts (on which people can also store other digital items).<sup>41</sup> All of these digital items may be valuable to a decedent's survivors, even if only in the sentimental sense. As one industry expert explained: "If you've lost someone, you cling to

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35. Wilkens, *supra* note 23, at 1054.

36. Hopkins, *supra* note 4, at 220.

37. Sherry, *supra* note 13, at 186; CARROLL & ROMANO, *supra* note 7, at 38.

38. Wilkens, *supra* note 23, at 1046. Twenty percent of young adults have three or more e-mail accounts. *Id.*

39.

There are no uniform statistics comparing the user numbers of the different web-based email address providers. Nevertheless, there is enough information available to make some statements about the popularity of different services. The big three are Microsoft's Hotmail (now called Windows Live Hotmail), Yahoo! Mail and Gmail, together accounting for well over 1 billion users.

Mark Brownlow, *Email and Webmail Statistics*, EMAIL MARKETING REP. (Dec. 2012), <http://www.email-marketing-reports.com/metrics/email-statistics.htm> [<http://perma.cc/FF49-S8T8>] (archived Feb. 24, 2014). Although the providers claim higher numbers, a Comscore study indicates that Gmail has 288 million users, Hotmail, 286 million, and Yahoo! mail, 282 million. *Id.*

40. Wilkens, *supra* note 23, at 1046.

41. By way of example, there are more than 250 million photographs uploaded to Facebook each day. Jason Mazzone, *Facebook's Afterlife*, 90 N.C. L. REV. 1643, 1647 (2012) [hereinafter Mazzone, *Facebook's Afterlife*].

everything they may have had. You realize that even the most pedestrian items become very meaningful after someone is gone.”<sup>42</sup>

Seemingly gone are the days when people would routinely print out photographs and save video cassette recorder tapes. Instead, many people store their photographs and videos solely in digital form,<sup>43</sup> either by saving them locally or online, often with websites such as Flickr,<sup>44</sup> Shutterfly,<sup>45</sup> Snapfish,<sup>46</sup> Photobucket,<sup>47</sup> or YouTube.<sup>48</sup> Many

42. Maimes, *supra* note 14 (quoting Evan Carroll of THE DIGITAL BEYOND, <http://www.thedigitalbeyond.com>) (internal quotation marks omitted). See also Perrone, *supra* note 5, at 198 (explaining that “a person’s digital presence can, after death, provide meaning to those still living”).

43. Gerry W. Beyer & Kerri M. Griffin, *Estate Planning for Digital Assets*, EST. PLAN. STUD., July 2011, at 3, available at <http://www.floridaprobatecounsel.com/wp-content/uploads/docs/Estate-Planning/Estate-Planning-For-Digital-Assets.pdf> [<http://perma.cc/67ZX-P56C>] (archived Feb. 24, 2014) (explaining that “[t]oday, this material [like special pictures, letters, and journals] is stored on computers or online and is often never printed”); Tyler G. Tarney, Comment, *A Call for Legislation to Permit the Transfer of Digital Assets at Death*, 40 CAP. U. L. REV. 773, 777 (2012) (“As the world becomes more dependent on technology, it is becoming more likely that the only copies of these pictures remain within password-protected accounts.”); Sherry, *supra* note 13, at 203 (“Notably, cloud services like Flickr and Snapfish mean that companies like Yahoo! often become the sole home for many people’s photos.” (internal quotation marks omitted)).

44. “Flickr, founded in 2004 and owned by Yahoo!, claims to be the largest photo-sharing site on the internet.” Sherry, *supra* note 13, at 202. Flickr hosts approximately 87 million users and 8 billion images. Craig Smith, *How Many People Use 378 of the Top Social Media, Apps & Tools? (February 2014)*, DIGITAL MARKETING RAMBLINGS (Feb. 16, 2014), <http://www.expandedramblings.com/index.php/resource-how-many-people-use-the-top-social-media/> [<http://perma.cc/W5YU-9H5Y>] (archived Feb. 24, 2014).

45. Shutterfly has 35 million users and 18 billion photos on its site. *Here’s How We Think of Shutterfly’s Stock Value*, SEEKING ALPHA (Mar. 1, 2013, 5:40 PM), <http://seekingalpha.com/article/1241641-heres-how-we-think-of-shutterflys-stock-value> [<http://perma.cc/9WZA-D3CK>] (archived Feb. 24, 2014). In 2012, billions of Kodak Gallery photos were moved to Shutterfly when Kodak closed the gallery. *Id.*

46. Snapfish was formed in 2000, CARROLL & ROMANO, *supra* note 7, at 28, and now claims 90 million users and 2 billion photos. *Welcome*, SNAPPISH, <http://www.snapfish.com/snapfish/aboutUs> (last visited Oct. 22, 2013) [<http://perma.cc/YEA5-HR4R>] (archived Feb. 24, 2014).

47. Photobucket claims 23 million monthly American users who upload more than 4 million images and videos each day. *About Photobucket*, PHOTOBUCKET, <http://photobucket.com/about> (last visited Oct. 22, 2013) [<http://perma.cc/A2WK-3DB4>] (archived Mar. 4, 2014).

48. YouTube was founded in 2005 as a video-sharing site, Sherry, *supra* note 13, at 203, and today there are approximately 1 billion users each month, *Statistics*, YOUTUBE, <http://www.youtube.com/yt/press/statistics.html> (last visited Oct. 22, 2013) [<http://perma.cc/WDV5-PU29>] (archived Feb. 24, 2014), and 120 billion videos on YouTube. Maimes, *supra* note 14. More than 800 million users access the site every month, Hopkins, *supra* note 4, at 218, and two-thirds of all Internet users check YouTube daily. Mielach, *supra* note 4. Users upload numerous hours of video every minute. Mazzone, *Facebook’s Afterlife*, *supra* note 41, at 1666 (putting the

also store and share various types of documents in digital form, either locally or online through Google Docs,<sup>49</sup> Scribd,<sup>50</sup> or Dropbox.<sup>51</sup> Computers and online accounts also hold various types of collections in digital form. For example, many have virtual libraries on a Nook or Kindle<sup>52</sup> and music on iTunes<sup>53</sup> or Pandora.<sup>54</sup>

Social media accounts may also be classified as sentimental digital items. Some claim that these accounts have replaced diaries,<sup>55</sup> despite the fact that social media involves interactions with others.<sup>56</sup> Americans have fervently embraced social networking in the past decade<sup>57</sup> and now spend about 16 minutes of every hour online on this

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number at 60 hours every minute); Sherry, *supra* note 13 (putting the number at 48 every minute); Hopkins, *supra* note 4, at 218 (putting the number at 24 every minute). YouTube is an excellent example of the overlapping nature of these categories, as first mentioned *supra* note 31. While YouTube is classified herein as a digital item of a sentimental nature, it can be financially valuable under the YouTube Partner Program. Sherry, *supra* note 13, at 203. Per this program, “YouTube runs advertisements across partners’ videos or makes them available for rent, then gives the ‘majority’ of the ad-generated money to the partners.” *Id.* at 203.

49. All Gmail users have access to GoogleDocs. See *supra* note 39 for the number of Gmail users.

50. Scribd has approximately 80 million monthly users. *About Us*, SCRIBD, <http://www.scribd.com/about> (last visited Jan. 28, 2014) [<http://perma.cc/97R2-7JHR>] (archived Feb. 24, 2014).

51. Dropbox has more than 200 million users. *What is Dropbox?*, DROPBOX.COM, <https://www.dropbox.com/news/company-info> (last visited Oct. 22, 2013) [<http://perma.cc/P483-VDMJ>] (archived Feb. 24, 2014).

52. Kindle has 17.4 million active users just in the United States. *17.4 Million Active Kindle Fire Users in US, 30.5 Million Active iPad Users*, NEWZOO (Apr. 19, 2012), <http://www.newzoo.com/press-releases/17-4-million-active-kindle-fire-users-in-us-30-5-million-active-ipad-users/> [<http://perma.cc/6SPC-PLRP>] (archived Feb. 24, 2014).

53. iTunes claims 575 million users. Daniel Eran Dilger, *Apple Now Adding 500,000 New iTunes Accounts Per Day*, APPLE INSIDER (June 13, 2013, 9:48 PM), <http://appleinsider.com/articles/13/06/14/apple-now-adding-500000-new-itunes-accounts-per-day> [<http://perma.cc/K36Y-FMKP>] (archived Feb. 24, 2014).

54. Pandora has more than 71 million users. Ryan Faughnder, *Pandora Reports 2nd-Quarter Sales Growth, Will End Listening Cap*, L.A. TIMES (Aug. 22, 2013, 3:51 PM), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-pandora-earnings-20130822.0,619681.story> [<http://perma.cc/5YZL-ENDB>] (archived Mar. 4, 2014); *Pandora Removes 40-Hour-Per-Month Limit On Free Mobile Listening*, PANDORA (Aug. 22, 2013), <http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol-newsArticle&ID=1849420&highlight=> [<http://perma.cc/9J9Z-NE2L>] (archived Feb. 24, 2014).

55. Beyer & Griffin, *supra* note 43, at 3; Beyer & Cahn, *Digital Planning*, *supra* note 5, at 140; Jason Mazzone, *The Right to Die Online*, 16 No. 9 J. INTERNET L. 1, 13 (2013) [hereinafter Mazzone, *The Right to Die Online*].

56. Cahn, *supra* note 29, at 37.

57. Businesses use social media, partly because advertising there is less expensive. Tarney, *supra* note 43, at 778.

activity.<sup>58</sup> This includes sites such as Facebook,<sup>59</sup> Google+,<sup>60</sup> Twitter,<sup>61</sup> LinkedIn,<sup>62</sup> MySpace,<sup>63</sup> Instagram,<sup>64</sup> and Snapchat,<sup>65</sup> as well as accounts and avatars created to participate in online games—like

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58. Matt Tatham, *For Every Hour Online Americans Spend 16 Minutes on Social Networks*, EXPERIAN (Apr. 18, 2013), <http://www.experian.com/blogs/marketing-forward/2013/04/18/for-every-hour-online-americans-spend-16-minutes-on-social-networks/> [<http://perma.cc/4G6X-AYAY>] (archived Feb. 24, 2014). Another source claims that internet users spend almost 20% of their online time on social media sites. Hopkins, *supra* note 4, at 217.

59. Although relatively young, this site currently boasts more than one billion active monthly users. *Newsroom: Key Facts*, FACEBOOK, <http://newsroom.fb.com/Key-Facts> (last visited Oct. 22, 2013) [<http://perma.cc/8FFG-NTQ8>] (archived Mar. 4, 2014). This is one in seven people on the planet. Mazzone, *The Right to Die Online*, *supra* note 55, at 13. If Facebook were a country, its population would be the third largest in the world. CARROLL & ROMANO, *supra* note 7, at 134.

60. As of December 2012, Google+ had 343 million active users. Stephen J. Vaughn-Nichols, *Google+ Moves up to Second Place in Social Networks*, ZDNET (Jan. 26, 2013, 9:27 PM), <http://www.zdnet.com/google-moves-up-to-second-place-in-social-networks-7000010372/> [<http://perma.cc/9U55-U9TK>] (archived Feb. 24, 2014). Nearly 60% of Google+ users check it daily. Mielach, *supra* note 4.

61. Twitter is a microblogging application allowing users to post no more than 140 characters at a time. Sherry, *supra* note 13, at 201–02. It is used by 18% of American adults, *Social Networking Fact Sheet*, PEW INTERNET, <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet> (last visited Mar. 12, 2014) [<http://perma.cc/5HKK-MGQV>] (archived Mar. 12, 2014), and according to one source, it boasts 200 million accounts and 230 million tweets per day. Mazzone, *Facebook's Afterlife*, *supra* note 41, at 1667. Twitter itself claims to have more than 645 million users. *Twitter Statistics*, STATISTICS BRAIN (Jan. 1, 2014), <http://www.statisticbrain.com/twitter-statistics/> [<http://perma.cc/1QH4-C3RT>] (archived Feb. 24, 2014).

62. This is the largest online professional network with 259 million members, Sherry, *supra* note 13, at 202, 40% of whom check in daily, Mielach, *supra* note 4. LinkedIn itself claims 238 million users. *About LinkedIn*, LINKEDIN, <http://press.linkedin.com/about> (last visited Oct. 22, 2013) [<http://perma.cc/9QK5-X99H>] (archived Mar. 4, 2014).

63. MySpace has 25 million users, John Bowman, *Myspace's \$20M Relaunch Deletes Its Remaining Users' Blogs*, CBCNEWS, <http://www.cbc.ca/newsblogs/yourcommunity/2013/06/myspaces-20m-relaunch-deletes-its-remaining-users-blogs.html> (last updated June 13, 2013) [<http://perma.cc/Y7ZG-LFDV>] (archived Feb. 24, 2014), and draws a younger crowd than does Facebook. Sherry, *supra* note 13, at 201. In addition to its social networking function, millions of artists use MySpace's popular music section to post and sell music. Mazzone, *Facebook's Afterlife*, *supra* note 41, at 1663.

64. Instagram has 150 million users, INSTAGRAM, <http://instagram.com/press/> (last visited Jan. 20, 2014), 70% of whom log in daily. Mielach, *supra* note 4.

65. Snapchat has more than 8 million American adult users, and more than 200 million snaps are exchanged per day. Jennifer Van Grove, *Snapchat Snapshot: App Counts 8M Adult Users in U.S.*, CNET (June 25, 2013, 11:54 AM), [http://news.cnet.com/8301-1023\\_3-57590968-93/snapchat-snapshot-app-counts-8m-adult-users-in-u.s/](http://news.cnet.com/8301-1023_3-57590968-93/snapchat-snapshot-app-counts-8m-adult-users-in-u.s/) [<http://perma.cc/8MXC-92F6>] (archived Feb. 24, 2014).

World of Warcraft<sup>66</sup> and Entropia Universe—and virtual, three-dimensional worlds like Second Life.<sup>67</sup>

### C. Digital Items of a Financial Nature

Certain digital items offer the ability to manage, spend, or earn money and, therefore, can be classified as financial in nature.<sup>68</sup> Accounts in online games are potential financial digital items,<sup>69</sup> as are online accounts linked to bank accounts, college funds, brokerage accounts, retirement plans, credit cards, loans, and insurance accounts.<sup>70</sup> PayPal and online shopping sites like Amazon<sup>71</sup> and eBay<sup>72</sup> are also classified as financial in nature,<sup>73</sup> as well as customer rewards

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66. Approximately 8.3 million users play World of Warcraft. Charles Arthur, *World of Warcraft: Is It Losing the Battle for Subscribers?*, GUARDIAN (May 9, 2013, 10:28 AM), <http://www.theguardian.com/technology/shortcuts/2013/may/09/world-of-warcraft-losing-battle-subscribers> [<http://perma.cc/BWR6-8FGV>] (archived Feb. 24, 2014).

67. Second Life has 33 million users. Daniel Voyager, *Second Life Statistics 2013 Spring Update*, DANIEL VOYAGER'S BLOG (Apr. 2, 2013), <http://Danielvoyager.wordpress.com/2013/04/02/second-life-statistics-2013-spring-update/> [<http://perma.cc/5RQF-K6KT>] (archived Feb. 24, 2014). Note, though, that although Second Life involves interaction with others and thus could be considered social networking, some argue its primary function is a virtual gaming site. Sherry, *supra* note 13, at 234–35.

68. CARROLL & ROMANO, *supra* note 7, at 151–53.

69. Though few would expect it, online games can be valuable digital assets that generate income. For example, one Second Life landholder, Anshe Chung, has virtual real estate holdings valued at more than \$1 million. Wu, *supra* note 10, at 1.

70. Nearly half of all adult Americans with access to the Internet pay their bills online because of the convenience and independence of doing so. Wilkens, *supra* note 23, at 1039. Further, the number of Internet users who conduct financial transactions online is increasing in every age group, with the 70- to 75-year-old age group responsible for the biggest increase since 2005. *Id.* at 1055.

71. Jessica Kril, *Statistics and Facts About Online Shopping*, STATISTA: THE STATISTICS PORTAL, <http://www.statista.com/topics/871/online-shopping/> (last visited Nov. 11, 2013) [<http://perma.cc/89VV-XB28>] (archived Feb. 24, 2014). In 2012, Amazon reportedly had approximately 182 million active customers. Owen Thomas, *Amazon Has an Estimated 10 Million Members for Its Surprisingly Profitable Prime Club*, BUSINESS INSIDER (Mar. 11, 2013, 5:30 PM), <http://www.businessinsider.com/amazon-prime-10-million-members-morningstar-2013-3> [<http://perma.cc/DA4N-QHC7>] (archived Feb. 24, 2014).

72. “eBay is the world’s largest online marketplace, facilitating an estimated \$2,000 in sales every second.” Sherry, *supra* note 13, at 204.

73. Americans spend about five minutes of every hour shopping online, Tatham, *supra* note 58, and it is predicted that Americans will spend \$327 billion on it in 2016, up from \$202 billion in 2011. Goldman & Jamison, *supra* note 5. It has been estimated that nearly 70% of all American Internet users purchased an item online in 2011. Hopkins, *supra* note 4, at 216. Some even have “digital wallet” applications on their cell phones that let users pay for products from their phones. Hill, *supra* note 16.

programs.<sup>74</sup> Likewise, some blogs and domain names qualify as financial digital items. While most of the 40 million blogs on the Internet<sup>75</sup> have little or no financial value, some generate significant revenue.<sup>76</sup> For example, in November of 2011, the most valuable blog, Gawker.com, was valued at \$318 million.<sup>77</sup> Like blogs, domain names can also be quite profitable.<sup>78</sup>

As more businesses embrace online life, they too obtain digital items that are classified as financial. In some situations, the business itself may exist only online, like virtual businesses, online auction houses, and eBay sellers. In others, a physical business may have digital items because it stores information, such as client lists, customer orders and preferences, customer contact information, and employee payroll accounts, in digital format. Some business owners, like computer programmers, graphic or web designers, photographers, authors, musicians, and artists, may sell products that are created or

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74. Many Americans have taken advantage of the plethora of loyalty programs like frequent flier, banking rewards, shopping rewards, and many others. One study reports that outstanding loyalty points had an estimated total value of \$50 billion in 2011. Beyer, *Estate Planning*, *supra* note 10, at 2. Some may amass a significant number of points or miles and die without having spent them. Grant, *supra* note 13. For example, some report members acquiring at least 3.5 trillion in unused miles. Beyer, *Estate Planning*, *supra* note 10, at 2.

75. Maimes, *supra* note 14. Many of them are housed on blog host websites like WordPress, Blogger, LiveJournal, and TypePad.

76. This revenue comes, in large part, from paid advertisements or subscription sales. Haller, *supra* note 13.

77. *Id.* As of 2011, other valuable blogs include: Drudge Report (\$93 million), Popsugar Media Network (\$64 million), SB Nation (\$56 million), Macrumors (\$52 million), Business Insider (\$45 million), Seeking Alpha (\$45 million), Cheezburger Nation (\$41 million), Mashable (\$39 million), and Gigaom (\$32 million). *The 10 Most Valuable Blogs in 2011*, ATLANTIC (Nov. 1, 2011, 3:09 PM), <http://www.theatlantic.com/business/archive/2011/11/the-10-most-valuable-blogs-in-2011/24706/> [<http://perma.cc/AT9D-Q6SD>] (archived Feb. 24, 2014). “America’s top ten most valuable blogs had an estimated aggregate value of \$785 million.” Haller, *supra* note 13.

78. Domain names are identification strings used to identify the location of a particular website and include URLs from sites like GoDaddy.com and Network Solutions. Haller, *supra* note 13. The domain name “Porn.com” sold in 2007 for \$9.5 million; “Insure.com” sold in 2009 for \$16 million, and “Sex.com” sold in 2010 for \$14 million. Beyer, *Estate Planning*, *supra* note 10, at 3. *But see* Haller, *supra* note 13 (asserting that “Sex.com” sold for \$13 million in 2010 after selling for \$14 million in 2006). “Hotels.com” sold in 2001 for \$11 million. Haworth, *supra* note 21, at 34. *See World’s Top 10 Most Expensive Domain Names*, MOST EXPENSIVE J., <http://most-expensive.com/domain-name> (last visited Oct. 22, 2013) [<http://perma.cc/LKK2-QYDC>] (archived Feb. 24, 2014). A domain name can depreciate quickly, and lack of knowledge of a decedent’s ownership of a domain name could cause a missed renewal deadline. Beyer & Griffin, *supra* note 43, at 3. Valuable domain names can have people “waiting to jump on them when the lease expires.” Marshall, *supra* note 1 (citing estate planning attorney James Lamm).

stored in digital form. These digital products may have additional value as intellectual property.<sup>79</sup>

## II. COMPETING INTERESTS TRIGGERED BY A DECEDENT'S DIGITAL FOOTPRINT

Computers and the Internet offer a convenient mode of communicating, storing sentimental items, and transacting financial affairs during life. However, when a person dies, figuring out what to do with his digital footprint is inconvenient for those left behind. A decedent's online activities can muddy estate administration, such that successors and others have a strong interest in accessing the decedent's digital footprint. Nevertheless, that interest must be balanced against the privacy rights of the decedent and others, which militate against access. As one commentator predicted, "The clash between privacy laws and estate administration is fast approaching."<sup>80</sup> Meanwhile, the important interests of OSPs, which disfavor access, and society, which favors access, must also be considered.

### *A. Estate Administration Interests*

A decedent's digital footprint can complicate his estate administration for numerous individuals and groups of people. The first affected individual is the decedent's succession representative, who faces the tasks of learning of, locating, and (legally) accessing the decedent's digital items. Another affected group is the decedent's successors, who could be forced to deal with the decedent's identity theft and, in some situations, the theft of content of the estate. As if these issues, which affect estate administration in all states, are not enough, in Louisiana, other people may be affected due to forced heirship. The interests of all of these groups of people lean in favor of allowing access to a decedent's digital footprint.

#### *1. Decedent's Succession Representative*

A decedent's succession representative faces the daunting task of marshaling, inventorying, and distributing the decedent's assets<sup>81</sup> and is encouraged to do so as quickly as possible.<sup>82</sup> This task proves difficult with regard to incorporeal property like digital items, as they

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79. Haller, *supra* note 13.

80. Wilkens, *supra* note 23, at 1055.

81. LA. CODE CIV. PROC. art. 3191 (2014).

82. *Id.* art. 3197.



are harder to learn of, locate, and access.<sup>83</sup> Of course, the more expansive one's digital footprint, the more difficult it is to effectively administer his estate. Nevertheless, a succession representative bears the implicit duties of avoiding wastage and safeguarding against the destruction of the decedent's property.<sup>84</sup>

To determine what to do with a decedent's digital footprint, the succession representative must first learn what digital items comprise it. If the decedent dies intestate or with a will that is silent as to digital items, the succession representative may be unaware of them, which will make these items difficult if not impossible to discover.<sup>85</sup> After all, the succession representative cannot find them "by rifling through a desk anymore . . . because they're online."<sup>86</sup> And, of course, if knowledge of a decedent's digital items lies solely with the decedent, that knowledge and the digital items themselves could disappear entirely upon his death.<sup>87</sup>

Gaining awareness of the decedent's digital items is only the first step; a succession representative must then locate them. The difficulty in doing so lies in the fact that people do not typically store their digital footprints neatly in one place. Instead, they typically store digital items on multiple computers, e-mail accounts, and through other online accounts.<sup>88</sup> As scholars have aptly noted, "Sorting through a deceased's online life for the important things can be just as daunting as cleaning out the house of a hoarder."<sup>89</sup>

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83. See LA. CIV. CODE. art. 461 (2014) ("Incorporeals are things that have no body, but are comprehended by the understanding, such as the rights of inheritance, servitudes, obligations, and right of intellectual property.").

84. Sherry, *supra* note 13, at 239.

85. Haller, *supra* note 13.

86. Kelly Greene, *Passing Down Digital Assets*, WALL ST. J. (Aug. 31, 2012, 8:20 PM), <http://online.wsj.com/article/SB10000872396390443713704577601524091363102.html> [<http://perma.cc/5BT9-FTQ3>] (archived Feb. 24, 2014) (quoting estate planning attorney William Schmidt). Most people do not print out hard copies of their digital items. Martin W. O'Toole, *Doing Estate Planning When the Fog Has Only Partially Lifted*, 2012 WL 191161, at \*12. What succession representatives have to do is search through decedent's hard copy papers, collect his mail, look at his computer, talk to his family and friends, and look at tax forms, particularly the 1099-INT. Baldino, *supra* note 8, at 31. Tax forms may prove less helpful as time passes. Already, some tax forms, like the W-2, are moving online, and taxes can be filed online. Wilkens, *supra* note 23, at 1047. The 1099-INT may suffer that fate eventually. *Id.* Also, since the 1099-INT is sent in January or February, there may be lag time between the death and the receipt of the form. *Id.* Further, if the account in question is not interest-paying, locating it may be even more difficult. Baldino, *supra* note 8, at 31.

87. Wilkens, *supra* note 23, at 1046.

88. *Id.* at 1039, 1046.

89. Beyer & Griffin, *supra* note 43, at 2; Beyer & Cahn, *Digital Planning*, *supra* note 5, at 139.

Once a succession representative learns of and locates the decedent's digital items, he must then access them, which can be inordinately difficult for a variety of reasons. First of all, chances are that the decedent has protected his digital items with passwords. Likely driven by threats to privacy and the possibility of identity theft, most people choose complicated passwords, change them frequently, and keep them secret.<sup>90</sup> The more sophisticated person utilizes different usernames, passwords, and security questions for each digital item.<sup>91</sup> The result of all of this self-protection is that many decedents inadvertently lock their succession representatives out of their digital footprints.

Even where a decedent has left behind a list of digital items, usernames, and passwords, a succession representative may face other barriers to access. For example, as will be discussed in Part III, the TOS that the decedent agreed to when creating certain digital items seemingly bars his succession representative from accessing them, as do some federal privacy laws. If the succession representative cannot access the decedent's digital items, then important bills may go unpaid, valuable assets may be overlooked, and estate administration may be unavoidably delayed.<sup>92</sup> If a decedent had set up an automatic online bill pay from an online account, the succession representative's inability to access that account may cause its eventual overdraft.

Ultimately, "[a]s more people leave behind only electronic records, it will become increasingly difficult to effectively administer estates."<sup>93</sup> Without a solution, succession representatives will be forced to rely on the judiciary, which is expensive and time-consuming.

## 2. Decedent's Successors

The lack of guidance regarding a decedent's digital footprint also affects his successors. One possible problem for successors is one of timing. If the decedent dies intestate, successors could have to wait a significant amount of time for the release of his assets, yet they would still be liable for estate debts.<sup>94</sup> The timing problem could also financially harm a decedent's business, which could negatively affect the estate.

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90. Passwords are typically random, are 8 to 12 characters long, and are changed every 90 days. Wilkens, *supra* note 23, at 1046. Online providers discourage the sharing of passwords. Walker & Blachly, *supra* note 19, at 182.

91. Wilkens, *supra* note 23, at 1039. The average person has 25 different passwords. Rex M. Anderson, *Digital Assets in Estates*, ARIZ. ATT'Y, Mar. 2013, at 44; Beyer & Cahn, *Digital Planning*, *supra* note 5, at 137.

92. Haller, *supra* note 13.

93. Wilkens, *supra* note 23, at 1041.

94. *Id.* at 1047.

Beyond this, successors could be adversely affected by posthumous identity theft of the decedent or content theft of certain digital items. Identity theft is a growing problem, certainly for the living and maybe more so for the deceased.<sup>95</sup> Many times, OSPs are simply unaware that the decedent has passed away.<sup>96</sup> Thus, until authorities update databases regarding a new death, digital items linger in “the Internet abyss.”<sup>97</sup> If a digital item contains sensitive information like credit card and bank account numbers, it becomes attractive to a potential identity thief,<sup>98</sup> who can open new credit cards, apply for jobs, and get identification in the name of the deceased.<sup>99</sup> Social networking sites are no exception and have been described by one commentator as “fresh hunting ground for spammers and hackers,”<sup>100</sup> especially if the decedent stored financial information there.<sup>101</sup> The reality is that “[h]ackers, spammers, and phishers now troll popular social networking sites like Twitter, Facebook, and MySpace, choosing carefully among the wealth of identities. The deceased are at particularly high risk for identity theft; [this is because] they cannot monitor the activity on their account or report misuse.”<sup>102</sup>

Deceased bloggers also face a similar problem of content theft and copyright violations.<sup>103</sup> While copyright protection lasts for life plus 70 years,<sup>104</sup> without proper protection of that right, the decedent’s protected works could be stolen, which could destroy the value of the copyright, an estate asset. The only way to prevent this is to have the material removed from the deceased’s blog, but as discussed in Part III, doing so is difficult given most of the TOS in place.

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95. Conner, *supra* note 8, at 321. The Bureau of Justice reported that 11.7 million Americans were the victims of identity theft between 2006 and 2008, and the resulting financial losses totaled more than \$17 billion. Ray, *supra* note 3, at 587–88. More recent sources claim that financial losses caused by identity theft total \$56 billion annually. Hopkins, *supra* note 4, at 232.

96. Conner, *supra* note 8, at 307.

97. *Id.* at 307.

98. *Id.*

99. Beyer & Griffin, *supra* note 43, at 2. Beyer & Cahn, *Digital Planning*, *supra* note 5, at 139. Hackers can “change, steal, or remove the . . . digital property of the decedent.” Ray, *supra* note 3, at 587.

100. Ray, *supra* note 3, at 588.

101. *Id.* at 587–93. For example, if a decedent uses applications like Facebook Connect, which link his profile to other sites that store financial information, “a hacker could make purchases using decedent’s account credits, stored credit card information, or gift cards from sites like Living Social, Groupon, and Amazon.” *Id.* at 592. This could exhaust the estate assets if the decedent’s credit card is still active and is equipped with an automatic bill pay function. *Id.* Similarly, a hacker could take, spend, or transfer a decedent’s Facebook Credits. *Id.* at 593.

102. *Id.* at 585.

103. *Id.* at 593–95.

104. 17 U.S.C. § 302(a) (2006).

3. *Decedent's Donees and Their Successors by Gratuitous Title in Louisiana*

In addition to a decedent's succession representative and successors, the issue of a decedent's digital footprint may affect even more groups of people in this unique, civil law state because of Louisiana's recognition of forced heirship. Forced heirship is a civil law concept codified in Louisiana. It provides that, subject to one exception,<sup>105</sup> if a decedent has forced heirs, he must reserve a certain portion of his estate, i.e., the forced portion, for them.<sup>106</sup> Forced heirs are children of the decedent who, at the time of the decedent's death, are either (a) under the age of 24 or (b) due to a mental incapacity or physical infirmity, permanently incapable of taking care of their persons or administering their estates.<sup>107</sup> Descendants of more remote degrees may represent the decedent's predeceased child for forced heirship purposes where either (a) the predeceased child of the decedent, had he lived to the time of decedent's death, would still be under the age of 24 or (b) the child of the predeceased child, because of a mental incapacity or physical infirmity, is permanently incapable of taking care of his person or administering his estate at the time of the decedent's death.<sup>108</sup> Subject to one exception,<sup>109</sup> if there are two or more forced heirs, the forced portion is one-half of the decedent's estate,<sup>110</sup> and each forced heir takes his respective portion called his "legitime."<sup>111</sup> If there is only one forced heir, the forced portion and that forced heir's legitime are one-fourth of the estate.<sup>112</sup>

In the event that the forced heirs' legitimes are not satisfied at the decedent's death, these heirs may bring an action for reduction,<sup>113</sup> which allows them to take back from the hands of the decedent's

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105. The exception to this general rule is disinheritance. *See generally* LA. CIV. CODE. arts. 1494, 1500, 1617–1626 (2014).

106. *Id.* art. 1495. The remainder is referred to as the disposable portion. *Id.*

107. *Id.* art. 1493(A). *See id.* art. 1493(E) (defining "permanently incapable of taking care of their persons or administering their estates at the time of death of the decedent").

108. *Id.* art. 1493(B), (C). The phrase "permanently incapable of taking care of their persons or administering their estates at the time of death of the decedent" is defined the same for these forced heirs as it is for first degree descendant forced heirs. *Id.* art. 1493(E).

109. *See id.* art. 1495 (explaining that when the fraction to which a forced heir would succeed intestate is smaller, that fraction should be used).

110. *Id.*

111. *Id.* art. 1494.

112. *Id.* art. 1495.

113. *Id.* art. 1503 (explaining that reduction is the remedy). Others besides the forced heirs may have the right to bring an action for reduction. *See id.* art. 1504 (also giving the right to the forced heirs' heirs or legatees or an assignee of a forced heir or his heirs or legatees by express conventional assignment).

donees or their successors by gratuitous title<sup>114</sup> the *inter vivos* and *mortis causa* donations<sup>115</sup> made by the decedent in the last three years of life to the extent necessary to satisfy the legitimes.<sup>116</sup>

To determine whether the forced heirs' legitimes are satisfied and, hence, whether they will need to bring an action for reduction, the value of all property belonging to the decedent at the time of death, including that purportedly divested by the testament, is added together.<sup>117</sup> From that sum, the estate debts are deducted.<sup>118</sup> Then, to that number, the value of all property disposed of by the decedent in the three years prior to his death is fictitiously added.<sup>119</sup> The resulting number is called the "active mass," and it is from the active mass that the forced heirs' forced portion (of one-half or one-fourth) is determined.<sup>120</sup>

Digital items could affect the decedent's donees and their successors by gratuitous title because such items could subject them to a reduction claim by a forced heir. Take, for example, a fictional decedent, Mr. X, a widower who dies intestate with one child who qualifies as a forced heir, \$60,000 in corporeal property<sup>121</sup> in his estate, and \$10,000 in estate debts. Assume also that he had made a \$50,000 cash donation in the past three years to his friend, Ms. A. Thus, his active mass is \$100,000 (\$60,000 in estate assets minus \$10,000 in estate debts, plus the \$50,000 gift to Ms. A). His forced heir is entitled to one-fourth of that number, i.e., \$25,000. Because Mr. X's forced heir is a first degree descendant, he will inherit all of Mr. X's property under Louisiana's intestacy laws.<sup>122</sup> Moreover, because Mr. X's property at death is corporeal, it will be sufficient to satisfy his forced heir's legitime. Therefore, no action for reduction will be required.

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114. See *id.* art. 1910 (defining "gratuitous contract"). Thus, a donee's successor by gratuitous title would be one to whom the donee gave the property without receiving a return advantage.

115. See *id.* art. 1469 for the definitions of the terms "donation *mortis causa*" and "donation *inter vivos*."

116. See *id.* art. 1505(A); see also LA. REV. STAT. ANN. § 9:2372 (2005). Note that some gifts are not subject to reduction. See, e.g., LA. CIV. CODE arts. 1505(C), (D), 1510–1511 (2014).

117. Art. 1505(A).

118. *Id.* art. 1505(B). Although the Civil Code article seems to indicate that this step should be performed third, as opposed to second, all authorities recognize the contrary. See, e.g., KATHRYN V. LORIO, SUCCESSIONS AND DONATIONS § 10:6, in 10 LOUISIANA CIVIL LAW TREATISE 320–27 (2d ed. 2009). See LA. CIV. CODE art. 1415 (2014) for a definition of "estate debts."

119. Art. 1505(A).

120. *In re* Succession of Linder, 92 So. 3d 1158, 1166 n.5 (La. Ct. App. 2012).

121. See LA. CIV. CODE art. 461 (2014) ("Corporeals are things that have a body, whether animate or inanimate, and can be felt or touched.")

122. *Id.* art. 888.

However, changing the type of property in the hypothetical could lead to a different result. Imagine now that Mr. X left behind \$10,000 in corporeal property and \$50,000 in digital assets about which no one knows. He also left behind \$10,000 in estate debts and had made a \$50,000 cash donation in the past three years to his friend, Ms. A. Now, because no one is aware of the digital assets worth \$50,000, Mr. X's active mass is \$50,000 (\$10,000 in estate assets minus \$10,000 in estate debts, plus the \$50,000 gift to Ms. A). His forced heir is entitled to one-fourth of that number, i.e., \$12,500. Because there are insufficient funds in the estate to cover the forced heir's legitime, he will have to assert an action for reduction against Ms. A.

This hypothetical illustrates that in Louisiana, it is not just the succession representative and successors of the decedent who could be impacted by a decedent's digital footprint. In the event that a decedent left behind forced heirs and also made donations in the three years prior to his death, his digital footprint could be extremely important to his donees and their successors by gratuitous title.

### *B. Privacy Interests*

In addition to the estate administration considerations, the digital footprint issue also calls for a consideration of the privacy rights of several groups. After all, digital assets may reveal secrets or hurtful information.<sup>123</sup> Consider, for example, the teenager who creates an e-mail account from which he communicates personal details to chosen individuals or the adulterer who creates an account for the sole purpose of communicating with an extramarital lover.<sup>124</sup> As discovery of this kind of information may posthumously hurt the decedent's reputation and those left behind, that particular digital item, i.e., the e-mail account, may be better left unfound.

Although in some contexts a person's privacy rights do not continue after death,<sup>125</sup> most probably expect that at least certain portions of their digital footprint will remain private. Certainly, the teenager and adulterer mentioned above have an expectation of privacy

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123. As one commentator noted, "Each of us can think of at least one e-mail that we would not want to fall into the wrong hands." Justin Atwater, *Who Owns E-mail? Do You Have the Right to Decide the Disposition of Your Private Digital Life?*, 2006 UTAH L. REV. 397, 399 (2006). A blogger echoed, "Who would get a hold of those crazy e-mails or goofball photos, and what could they do with them? . . . Now, just who do you trust to see ALL of those e-mails (or to filter them before they are seen)?" Conner, *supra* note 8.

124. Tarney, *supra* note 43, at 782. See also Haller, *supra* note 13 (also raising the issue of a child born out of wedlock).

125. Kutler, *supra* note 10, at 1666; Mazzone, *Facebook's Afterlife*, *supra* note 41, at 1654-55; Sherry, *supra* note 13, at 211.

when creating their password-protected accounts.<sup>126</sup> Some have tried to negate the privacy interest by pointing out that private letters, diaries, and photographs can contain information just as private as digital items and yet are still heritable.<sup>127</sup> This may be true for digital items stored locally, especially those not password-protected. However, this argument is unpersuasive with regard to at least some digital items. For instance, as one scholar opined with regard to e-mails, “[P]eople should be able to assume their mail is private, whether they are sending it via the Postal Service or an electronic method.”<sup>128</sup> Further, people know when they keep corporeal items, like those mentioned above, that those things are likely going to be found when they die. The same cannot necessarily be said of an e-mail account, the existence of which the decedent may have never disclosed to anyone. Additionally, unlike traditional letters, many e-mail communications involve a two-way capture of information. As such, one must consider the privacy rights of the person with whom the decedent was communicating who may also want to avoid disclosure of certain information. This could be especially important if that person has a confidential relationship with the decedent, such as doctor–patient or attorney–client.

Although e-mail is probably the most notable example, a person also has a privacy interest in the content on social networking sites, such as the person’s name and image, educational background, hometown, contact information, location on certain days at certain times, and online posts.<sup>129</sup> Although a social networking profile is never entirely “private” because this would defeat the entire point of social networking, individual users may not want their information shared outside of the people with whom they have voluntarily connected. In fact, some users may feel even more protective of their social networking profiles than they do other digital items because they are keeping that profile purposefully separate from their real-world personas. Some people use social networking sites to interact with a different set of people, show another side of themselves, or say and do things in the virtual world that they would not say and do in the real world.<sup>130</sup> Likewise, other members of the site may have legitimate

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126. Tarney, *supra* note 43, at 782.

127. Jonathan J. Darrow & Gerald R. Ferrera, *Who Owns a Decedent’s Emails: Inheritable Probate Assets or Property of the Network?*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 281, 313 (2007).

128. Atwater, *supra* note 123, at 405–06 (quoting Laurie Thomas Lee, *Watch Your E-mail! Employee E-mail Monitoring and Privacy Law in the Age of the “Electronic Sweatshop”*, 28 J. MARSHALL L. REV. 139, 144 (1994)).

129. Mazzone, *Facebook’s Afterlife*, *supra* note 41, at 1652–53.

130. As one blogger explained:

We have ‘Internet friends’ and ‘real life friends.’ We have interests that we only explore through the Web, and those we never include in any

privacy interests. These respective privacy interests weigh against allowing access to a decedent's digital footprint.

Still, those left behind may have legitimate reasons for wanting to access the decedent's digital items, and their interests must be considered as well. Digital items can hold content that is extremely valuable, sentimentally speaking, to these people. As a cyber-anthropologist Michaelanne Dye noted, "People tend to go back to these pages on anniversaries, birthdays and holidays' (*sic*) as a way to keep a part of their loved one alive."<sup>131</sup> One commentator noted, "Some people create new pages as memorial sites, which serves as an emotional outlet. . . . [C]reating a path so that loved ones can walk your online trail can help families cope with the loss."<sup>132</sup>

Consider, for example, the parents of 21-year-old Benjamin Stassen, who unexpectedly committed suicide.<sup>133</sup> The Stassens are currently fighting with Facebook and Google for access to Benjamin's accounts, averring that information in these accounts may give insight into Benjamin's last days and provide them with "some understanding, maybe some peace."<sup>134</sup> This is but one high-profile example of the

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status updates. We can be one person offline, and someone else entirely on the Web. In many cases, this disconnect is a good thing. . . . [W]hen our 'real-life' selves become trapped by self-doubt or overbearing peers or family members, an anonymous username can do wonders for our inner My Little Pony fan.

Andrew Coutts, *The Digital Self: Our Online Lives are Our 'Real' Lives*, DIGITAL TRENDS (May 7, 2013), [www.digitaltrends.com/opinion/the-digital-self-our-online-lives-are-our-real-lives/](http://www.digitaltrends.com/opinion/the-digital-self-our-online-lives-are-our-real-lives/) [<http://perma.cc/G7TJ-2FMB>] (archived Feb. 24, 2014).

131. Gerry W. Beyer, *Your Social Media Page Serves as Emotional Outlet After You Pass*, WILLS, TR. & EST. PROF BLOG (Aug. 23, 2013), [http://lawprofessors.typepad.com/trusts\\_estates\\_prof/2013/08/courtrooms-across-the-nation-are-deciding-the-fate-of-online-social-media-accounts-for-family-members-who-are-trying-to-gain.html](http://lawprofessors.typepad.com/trusts_estates_prof/2013/08/courtrooms-across-the-nation-are-deciding-the-fate-of-online-social-media-accounts-for-family-members-who-are-trying-to-gain.html) [<http://perma.cc/AK2W-HY8R>] (archived Feb. 24, 2014) (internal quotation marks omitted).

132. *Id.* See also Carrie Arnold, *How to Manage Your Digital Afterlife*, SCI. AM. (Oct. 1, 2013), <http://www.scientificamerican.com/article.cfm?id=how-to-manage-your-digital-afterlife> [<http://perma.cc/3ZG6-PD2J>] (archived Feb. 24, 2014) (discussing the growing evidence that suggests that one's digital footprint can help those left behind grieve and cope); CARROLL & ROMANO, *supra* note 7, at 142 (discussing communal bereavement).

133. Jessica Hopper, *Digital Afterlife: What Happens to Your Online Accounts When You Die?*, NBC NEWS (June 1, 2012, 10:53 AM), <http://rockcenter.nbcnews.com/news/2012/06/01/11995859-digital-afterlife-what-happens-to-your-online-accounts-when-you-die?lite> [<http://perma.cc/J7PB-ECGY>] (archived Feb. 24, 2014).

134. *Id.* Although a local judge issued an order directing Facebook to give the Stassen family access to their son's account, to date, the company has not complied. *Id.*



tension between the posthumous privacy rights of the decedent and the rights of successors.<sup>135</sup>

Nonetheless, family members should be careful in seeking access to a decedent's digital items. As a journalist pointed out in a discussion of one family's experience, "[T]aking hold of [the deceased girl's] digital afterlife forced her family to tread a line between celebrating her, and invading her privacy. In the process, her family discovered some dark journals [she] clearly meant to conceal. She had passwords for a reason."<sup>136</sup>

### C. Interests of the OSPs

Caught in the middle of estate administration issues and privacy battles are the OSPs,<sup>137</sup> who "need legal stability and certainty to design effective services and to craft enforceable contracts."<sup>138</sup> These companies are financially incentivized to deny access to a decedent's digital items, as doing otherwise would cost them time and money.<sup>139</sup>

Some lack empathy for OSPs, given their substantial revenues and superior position to aid a decedent's succession representative.<sup>140</sup> Those individuals believe that handling decedents' digital items should be part and parcel of an OSP's business. As one commentator noted, "Time and money are foreseeable costs in dealing with the realities of

135. See also Tracy Sears, *Family Wins in Fight Against Internet Giants, on Hand When Governor Signs Law*, WTVR.COM (Jul. 2, 2013, 1:07 AM), <http://wtvr.com/2013/07/02/eric-rash-family-and-lawmakers-push-for-laws-against-internet-giants-after-sons-suicide/> [<http://perma.cc/A4V4-KRVZ>] (archived Feb. 24, 2014) (discussing the parents of Eric Rash who, after their son's suicide at age 15, successfully lobbied for legislation in Virginia to allow parents and legal guardians the right to posthumously access a minor's social media accounts); Anne Hobson, *The Digital Afterlife*, AM. SPECTATOR (May 30, 2013, 11:11 AM), <http://spectator.org/blog2013/05/30/the-digital-afterlife-what-hap> [<http://perma.cc/3Y27-7GDX>] (archived Mar. 5, 2014) (detailing the plight of Karen Williams, who figured out her deceased son's Facebook password only to see Facebook change it and then take down the account).

136. Haworth, *supra* note 21, at 2 (quoting Geoffrey A. Fowler, *Life and Death Online: Who Controls a Digital Legacy?*, WALL ST. J. (Jan. 5, 2013, 7:30 AM), available at <http://online.wsj.com/article/SB10001424127887324677204578188220364231346.html>) (internal quotation marks omitted).

137. "It's a concern of internet service providers being caught between privacy and the meaning of their contracts and being faced with a court order to which there could be quite severe penalties if they don't comply with it." Hopper, *supra* note 133 (quoting Naomi Cahn, law professor at George Washington University). See also Katy Steinmetz, *States Seek a Way to Pass On Digital Accounts After You Die*, TIME (Jul. 27, 2013), available at <http://swampland.time.com/2013/07/27/states-look-for-a-way-to-pass-on-digital-accounts-after-you-die/> [<http://perma.cc/C6Y8-CSXK>] (archived Feb. 24, 2014) (noting that companies are "in a sticky position" for the same reason).

138. Tarney, *supra* note 43, at 793.

139. Ray, *supra* note 3, at 613; Tarney, *supra* note 43, at 799.

140. Ray, *supra* note 3, at 613.

businesses founded on services to individuals, and these costs cannot justifiably be passed on to society for the sole purpose of increasing profit margins.”<sup>141</sup>

However, most OSPs are justifiably nervous about violating privacy laws,<sup>142</sup> and their businesses may be negatively affected if they earn the reputation of disseminating private information.<sup>143</sup> Worse, the OSPs could be liable if they provide access to or copies of a decedent’s digital items to an individual lacking the legal right to get them.<sup>144</sup> Further restraining the OSPs are their own TOS<sup>145</sup> that recognize that a user may want to maintain his privacy even posthumously.<sup>146</sup> Understandably, OSPs lean towards honoring their own TOS and, in most instances, will fight to enforce them, invoking their users’ privacy rights.<sup>147</sup>

Consider one of the most publicized such stories—that of Justin Ellsworth, a U.S. Marine killed in the line of duty in Iraq in 2004.<sup>148</sup> During his tour, Ellsworth communicated with others by e-mail and planned to create a scrapbook of all of those communications when he returned home.<sup>149</sup> Upon his death, Justin’s family decided to honor his memory by assembling the scrapbook that he had planned.<sup>150</sup> However, Yahoo! refused to allow them access to his account, citing its TOS.<sup>151</sup> Eventually, a probate court in Oakland County, Michigan, ordered Yahoo! to provide copies of the e-mails.<sup>152</sup> Yahoo! has proclaimed that in the future, it will continue to adhere to its TOS even in the face of requests similar to those of the Ellsworth family.

Some support the OSPs’ position. As Rebecca Jeschke of the Electronic Frontier Foundation, a digital civil liberties group, explained, “I think it’s a good idea for sites not to have a blanket policy to hand this stuff over to survivors. This information is private and you assume that it’s private, you assume that your Facebook account is private, you assume that your email account is private . . . .”<sup>153</sup> Others disagree, arguing that it is in the best interest of the OSPs to allow access after death, as this will encourage increased use of their services and greater creativity in that use.<sup>154</sup> Ultimately, OSPs seem to be in a

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141. *Id.*

142. *See infra* Part III.

143. Tarney, *supra* note 43, at 794.

144. *See* Ray, *supra* note 3.

145. *See infra* Part III.

146. Hopper, *supra* note 133.

147. Maimes, *supra* note 14.

148. CARROLL & ROMANO, *supra* note 7, at 12–14.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Hopper, *supra* note 133.

154. Kutler, *supra* note 10.

catch-22 situation. They are vilified as insensitive if they refuse access to grieving families, yet they are vilified as inconsistent if they grant it.<sup>155</sup>

#### *D. Societal Interests*

Rounding out the list of those interested in the digital footprint issue is society. Many people save various things in digital format, and if they fail to alert others of and provide access to those things, certain memories and stories of their lives could be lost forever. This is a loss not only for a decedent's legacy and successors but also for society as a whole. Digital items can be "informative snapshots of current society for the benefit of future generations and as a means of encouraging societal creativity."<sup>156</sup> This is especially true of social networking accounts, which may be the principal—and eventually only—source for future generations to learn about their predecessors.<sup>157</sup> Thus, it is predicted that future historians will depend upon digital archives to reconstruct the past, and if digital items are inaccessible, historians lose valuable pieces of history.<sup>158</sup> As one person noted: "Without some type of digital asset reform now, we will remain indebted to archeologists in the future to tell future generations about the electronic world we live in today. Why not make their job easier?"<sup>159</sup> Therefore, this interest weighs in favor of allowing access to a decedent's digital footprint.

### III. LEGAL ISSUES

In addition to potentially affecting the interests of several groups of people, a decedent's digital footprint triggers legal issues in a variety of areas of substantive law. All hinge on whether some or all of the digital items in a decedent's digital footprint can be transferred or accessed upon death. The first issue is whether digital items are properly considered property. After all, if they are not, they are not owned by the decedent and are not transferred with the rest of his patrimony at

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155. Tarney, *supra* note 43.

156. Kutler, *supra* note 10, at 1654.

157. Mazzone, *Facebook's Afterlife*, *supra* note 41, at 1659. This concept is reinforced by the fact that the Library of Congress now archives all public tweets because "[i]ndividually tweets might seem insignificant, but viewed in the aggregate, they can be a resource for future generations to understand life in the 21st century." *Id.* at 1660.

158. *Id.* at 1644.

159. Comments to the draft Fiduciary Access to Digital Assets Act from Richard and Diane Rash, July 5, 2013, *available at* [http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013jul5\\_FADA\\_Comments\\_Rash.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013jul5_FADA_Comments_Rash.pdf) [<http://perma.cc/M55Y-W9LX>] (archived Feb. 24, 2014).

death. The second issue is whether, in light of the OSPs' TOS, the relevant contract law will prohibit transfer or access. Some TOS, for example, preclude the transfer of certain digital items and also bar the sharing of passwords. The final issue is whether certain privacy statutes, written long before the digital era, will unintentionally do the same.

#### *A. Property/Estate Law*

For many people, transferring their patrimony at death is necessary to preserve their assets and provide financially and emotionally for future generations.<sup>160</sup> Thus, doing so has historically been a fundamental property right.<sup>161</sup> Over the years, the definition of property has evolved to include more intangible, or incorporeal,<sup>162</sup> assets.<sup>163</sup> However, “[m]ost of the estates and property laws go back hundreds of years, long before digital life, and yet those old legal concepts are now trying to deal with the digital today.”<sup>164</sup> And, of course, traditional property concepts do not always perfectly align with digital items, leading to some confusion and disagreement as to whether digital items are even properly considered property.<sup>165</sup> If the digital item is in fact property, then theoretically, the user owns it and can transfer it either during life or at death because “[o]wnership and transferability of assets are linked together.”<sup>166</sup> However, if the digital item is not property, it may not be susceptible of either ownership or transfer by the decedent. In the latter scenario, it could not be transferred via succession law, even if done so pursuant to a legally valid testament.

Although it may be argued that digital items lacking financial value are not property, this argument lacks merit. The monetary value of an item is not determinative of its status as property.<sup>167</sup> After all, old photo

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160. CARROLL & ROMANO, *supra* note 7, at 58–59.

161. Hopkins, *supra* note 4, at 210.

162. Incorporeal property in a civil law system is, for the most part, equivalent to the common law's intangible property. *See, e.g.,* La. Health Serv. & Indem. Co. v. McNamara, 561 So. 2d 712, 717 (La. 1990).

163. Kutler, *supra* note 10, at 1664.

164. Cantrill et al., *supra* note 8.

165. *See, e.g.,* Tarney, *supra* note 43, at 783 (“There is substantial ambiguity in defining the ownership status of digital assets.”); Shah, *supra* note 34 (“[T]here is no real consensus regarding ownership and transferability of digital assets . . . .”); CARROLL & ROMANO, *supra* note 7, at 121 (stating that “the law isn’t even sure that email can be considered property”).

166. Hopkins, *supra* note 4, at 224.

167. According to renowned civil law scholar, A. N. Yiannopolous, “In Louisiana jurisprudence, the word property is used broadly to denote rights forming part of a

albums and recipe books may lack monetary value, but no one questions whether they are part of a decedent's patrimony. Others may argue that digital items should not be considered "property" because they are not actually owned by the decedent.<sup>168</sup> Given the current lack of direction on the digital footprint issue in Louisiana and the OSPs' TOS (discussed in further detail below), this position is a valid one with respect to at least some digital assets. After all, some TOS provide that, upon uploading information to the site, the user transfers ownership of that information to the OSP.<sup>169</sup> In those situations, decedents do not own the digital items (either during life or at death). Other TOS provide that digital items are nothing more than licenses allowing one to use an OSP's services,<sup>170</sup> and typically, these licenses are non-transferrable and expire upon the death of the licensee-user.<sup>171</sup> Thus, in those situations, the digital items are not property susceptible of ownership.<sup>172</sup> Therefore, even if a decedent leaves behind usernames and passwords in a legally valid will (which may also be prohibited by the TOS),<sup>173</sup> the decedent does not actually legally transfer anything. After all, a will cannot transfer something that no longer exists.

On the other hand, other digital items, such as those that constitute intellectual property, are properly classified as incorporeal property.<sup>174</sup> For example, copyright law protects original works of authorship fixed in any tangible medium of expression.<sup>175</sup> As such, certain materials

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person's patrimony . . . ." A. N. YIANNPOLOUS, PROPERTY § 3, *in* 2 LOUISIANA CIVIL LAW TREATISE 4 (4th ed. 2001).

168. Tarney, *supra* note 43, at 783 ("Commentators have recognized that traditional property concepts have created a substantial ambiguity in defining the ownership status of digital assets."). *See also* Shah, *supra* note 34 ("[T]here is no real consensus regarding ownership and transferability of digital assets . . ."); Beyer & Griffin, *supra* note 43.

169. Conner, *supra* note 8, at 305.

170. Shah, *supra* note 34; Baldino, *supra* note 8, at 29; Walker & Blachly, *supra* note 19.

171. Walker & Blachly, *supra* note 19.

172. Mazzone, *Facebook's Afterlife*, *supra* note 41, at 1648 (discussing Facebook); Haworth, *supra* note 21, at 21 (discussing iTunes).

173. Mazzone, *Facebook's Afterlife*, *supra* note 41, at 1648.

174. *Filmtec Corp. v. Allied-Signal Inc.*, 939 F.2d 1568, 1572 n.5 (Cal. 1991) ("Intellectual property is the most intangible form of property . . ."). *See also* Elizabeth H. Sillin, *Five Estate Planning Tips for Managing Your Digital Assets*, <http://www.bulkley.com/bulletins/winter-2012/five-estate-planning-tips-for-managing-your-digital-assets/> [<http://perma.cc/NM2J-TAZD>] (archived Feb. 24, 2014) (noting that things that have been published online should be protected by copyright laws and, under those laws, transferable).

175. 17 U.S.C. § 102(a) (2006) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . .").

that a decedent authors, like poems, essays, photographs, videos, commentary, and status updates, satisfy the definition of “original works of authorship,” and their storage in digital form renders them fixed in a tangible medium of expression. Therefore, such items should qualify as intellectual property and be protected by federal copyright law by the plain language of the statute.<sup>176</sup> And because a copyright is properly classified as property, it can (at least theoretically)<sup>177</sup> be transferred at death through state successions law.<sup>178</sup>

### B. Contract Law

Contract law is another area of law that may impact the digital footprint issue. In many cases, the contract that a decedent entered into when creating certain digital items, i.e., the TOS, precludes access to that digital item.<sup>179</sup> Some do so by defining a period of inactivity beyond which the account is deactivated or deleted.<sup>180</sup> Others disallow the sharing of passwords and specifically forbid the transfer of the account.<sup>181</sup> This means that, in many cases, the TOS forbid the decedent’s succession representative from accessing or managing the decedent’s digital items.<sup>182</sup>

Although users are at least theoretically aware of and encouraged to read the TOS, many do not do so carefully, if at all.<sup>183</sup> Studies show that the number of users who “even skim” the TOS “may be about two in every one thousand,”<sup>184</sup> and only 4% of all online customers actually

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176. Mazzone, *Facebook’s Afterlife*, *supra* note 41, at 1649 (discussing Facebook).

177. Although the successors may, via state successions law, own the copyright-protected material in question, they may not be able to access it or obtain a copy of the materials from the website provider in question. Tarney, *supra* note 43, at 783. Also, per the TOS, the OSP may legally destroy the copy, which might be the only copy. *Id.* at 784–85.

178. Mazzone, *Facebook’s Afterlife*, *supra* note 41, at 1649. *See also* Elizabeth H. Sillin, *Five Estate Planning Tips for Managing Your Digital Assets*, BULKLEY RICHARDSON, <http://www.bulkley.com/bulletins/winter-2012/five-estate-planning-tips-for-managing-your-digital-assets> (last visited Oct. 22, 2013) [<http://perma.cc/DF6X-H38F>] (archived Feb. 24, 2014) (noting that things that you have published online should be protected by copyright laws, and under those laws, transferable).

179. Of course, this is not true of all digital items. Some provide that the account may be transferred by operation of a will. Wu, *supra* note 10, at 4. Some set forth procedures that a decedent’s succession representative must follow to get access to the deceased user’s account. Baldino, *supra* note 8, at 30.

180. CARROLL & ROMANO, *supra* note 7.

181. Laise, *supra* note 27.

182. *Id.*; Haller, *supra* note 13; Hopper, *supra* note 133.

183. Beyer & Cahn, *Digital Planning*, *supra* note 5, at 141; Maimes, *supra* note 14; Kutler, *supra* note 10, at 1645–46.

184. Sherry, *supra* note 13, at 205.

read beyond the “price and product description.”<sup>185</sup> Even those who do read the TOS may not understand them and are typically in no position to bargain for any alternative terms.<sup>186</sup> Thus, more often than not, the TOS unilaterally dictate the fate of the account, leading some to criticize the companies as “[t]rying to be God-like.”<sup>187</sup> As one industry commentator explained:

You know, those boxes that pop up with thousands of words of tiny text that you never read followed by a box that you are required to check that says “I Agree”. Yeah, those. Somewhere buried in there is language that likely allows the service provider to pretty much dictate whatever they want . . . .<sup>188</sup>

Thus, some argue that the TOS are contracts of adhesion and should not be enforced.<sup>189</sup> Yet, most courts disagree, leaving the OSPs with no incentive to change them.<sup>190</sup>

All of this poses a significant problem because in most cases, although the content of an account clearly belongs to the decedent, the OSP’s denial of access leaves the succession representative in a difficult position. Even if the succession representative has the log-in information and authority of the decedent, accessing the digital item may constitute a violation of the TOS, which could leave the estate vulnerable to liability.<sup>191</sup>

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185. Tarney, *supra* note 43, at 778–79.

186. Michael D. Roy, Note, *Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning*, 24 QUINNIPIAC PROB. L.J. 376, 381 (2011).

187. Kutler, *supra* note 10, at 1651. *See also* Tarney, *supra* note 43, at 793 (referring to the OSPs as having the upper hand).

188. Jeffrey R. Gottlieb, *Introduction to Estate Planning for Digital Assets*, L. OFF. ROBERT GLORCH (June 25, 2013), <http://www.illinoisestateplan.com/introduction-to-estate-planning-for-digital-assets> [<http://perma.cc/HT4C-BU4E>] (archived Feb. 24, 2014).

189. Tarney, *supra* note 43, at 778; Sherry, *supra* note 13, at 204. In Louisiana, “[a]dhesion contracts are not automatically void. Instead, the party seeking to avoid the contract generally must show that it is unconscionable.” *Lafleur v. Law Offices of Anthony G. Buzbee*, 960 So. 2d 105, 112 (La. Ct. App. 2007) “Unconscionability refers to an absence of meaningful choice on the part of one of the parties together with contract terms that are unreasonably favorable to the other party.” *Id.* Thus, to be unenforceable under this theory, a contract must contain both a procedural and substantive element of unconscionability but not necessarily in the same degree. *Id.*

190. Cahn, *supra* note 29, at 37; Kutler, *supra* note 10, at 1646. In rare cases, a court will rule the TOS unenforceable. Sherry, *supra* note 13, at 205. For example, in *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Penn. 2007), the court found parts of Second Life’s TOS unconscionable, as they assumed too much power and were unreasonably biased against the user. Kutler, *supra* note 10, at 1658.

191. The danger is that “a court would . . . hold the decedent’s estate bound to the terms of the user agreement, in the same way it would hold the decedent while he was alive.” Conner, *supra* note 8, 313.

Of course, court orders can trump TOS.<sup>192</sup> After all, if an OSP is doing business in a jurisdiction and the court orders it to do something, it has to comply; if not, it can be held in contempt of court.<sup>193</sup> However, securing such an order is not necessarily an easy task. As one author explained, “You’ve got to hire lawyers. It’s time-consuming. Some people may go to all that trouble and it took forever to get the order and by the time they got it, the stuff had been destroyed. It’s just an unworkable and very inefficient way of doing things.”<sup>194</sup> Similarly, another commentator labeled the “tension between restrictive contractual agreements and digital development” as “a perfect storm.”<sup>195</sup>

### C. Privacy Statutes

Even if the items in a decedent’s digital footprint are considered property and even if the TOS do not prohibit sharing passwords or transferring the digital items, there is still another problem: Certain criminal and civil privacy statutes may disallow or impede access to the decedent’s digital footprint.

For example, as one commentator noted, “If you use your late mother’s password to log on to her account, you may violate not only the provider’s terms of service but also the federal Computer Fraud and Abuse Act.”<sup>196</sup> This statute, referred to by its acronym CFAA, criminalizes the intentional unauthorized access of certain computers.<sup>197</sup> Given that it was enacted in the 1980s before the average American used computers or the Internet, Congress probably never intended the CFAA to apply to the digital footprint issue.<sup>198</sup> Nevertheless, the U.S. Department of Justice (DOJ) has proclaimed that violating the TOS on certain websites is a federal crime under the CFAA; that said, the DOJ has also stated that it has no intent to prosecute what it deems “minor violations.”<sup>199</sup> Although research reveals no case of prosecution of a succession representative for unauthorized access to a decedent’s digital footprint under this statute, there is no guarantee that prosecution under these circumstances would never happen.<sup>200</sup>

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192. Hopper, *supra* note 133.

193. *Id.*

194. *Id.*

195. Tarney, *supra* note 43, at 782.

196. Laise, *supra* note 27.

197. 18 U.S.C. § 1030 (2006).

198. *Computer Fraud & Abuse Act*, UNIV. CINCINNATI, <http://www.uc.edu/info/sec/compliance/cfaa.html> (last visited Jan. 30, 2014) [<http://perma.cc/3GJU-K89Y>] (archived Feb. 24, 2014).

199. Haller, *supra* note 13.

200. *Id.*



Additionally, the Stored Wire and Electronic Communications and Transactional Records Access Act (SCA) prohibits certain conduct by individuals and the OSP. Section 2701 applies to individuals and prohibits them from (1) “intentionally access[ing] without authorization a facility through which an electronic communication service is provided” and (2) “intentionally exceed[ing] an authorization to access that facility.”<sup>201</sup> It does not apply to “conduct authorized . . . by a user of that service with respect to a communication of or intended for that user.”<sup>202</sup> The term “authorization” is not defined in the SCA, and a violation of this section can lead to imprisonment and fines.<sup>203</sup> Section 2702 governs OSPs and bars them from knowingly divulging the contents of a communication unless disclosure is made “to an addressee or intended recipient of such communication” or “with the lawful consent of the originator or an addressee or intended recipient.”<sup>204</sup> Of course, consent is impossible to obtain from the decedent after death; instead, it would have to have been given before death, either via a will or some other juridical act or by conduct in forwarding account information.<sup>205</sup> Consent is also difficult to obtain from the other party if it is a financial institution, given the statutes and jurisprudence restricting the institution’s ability to disclose information.<sup>206</sup> Further, if the OSP’s TOS specifically prohibit the user from granting access to others, doing so could be a violation of these statutes as being without consent.<sup>207</sup> Developing case law indicates a willingness on the part of some courts to consider at least some communications through some popular digital items to be subject to the SCA.<sup>208</sup> Violations can subject OSPs to statutory damages (including, in some cases, punitive damages), attorneys’ fees, and costs.<sup>209</sup>

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201. 18 U.S.C. § 2701(a) (2006).

202. *Id.* § 2701.

203. *Id.* § 2701(b).

204. *Id.* § 2702.

205. Wilkens, *supra* note 23, at 1053.

206. *Id.* at 1054 (discussing the Gramm-Leach-Bliley Act of 1999, 15 U.S.C. §§ 6801–6809, and the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401–3422).

207. Beyer, *supra* note 10, at 6.

208. *See, e.g.,* Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965, 980 (C.D. Cal. 2010) (ruling that private messages sent through a web-based e-mail provider or through social networking are subject to the SCA); *People v. Harris*, 945 N.Y.S.2d 505, 511 (N.Y. Crim. Ct. 2012) (ruling Twitter to be an electronic communication provider under the SCA).

209. 18 U.S.C. § 2707 (2006).

## IV. CURRENT APPROACH

There is no targeted approach to the digital footprint issue in Louisiana because neither the Legislature nor the courts has specifically addressed the issue. Thus, the onus is on the individual to provide for his digital footprint via estate planning.<sup>210</sup> However, some claim that “[t]he tools and resources that estate planners and their clients have relied on for hundreds of years have become obsolete because of technology.”<sup>211</sup> There are two versions of an estate plan that one can take in planning for his digital footprint: (1) the inventory model or (2) the trust model. As discussed in detail in this Part, neither is ideal.

*A. Inventory Model*

The first estate planning tool that a decedent could use is an inventory. The inventory model has been touted as an easy-to-use, inexpensive, portable, easily accessible, and time-saving way to preserve assets.<sup>212</sup> The inventory model hinges on the decedent’s creation of a central inventory of his digital footprint, the location of which he then informs someone else. Proponents of this model advise those using it to update all of the information in the inventory regularly.<sup>213</sup>

However, beyond these basics, there is a lack of consensus on best practices for this model. Some suggest that people should explain their wishes regarding each digital asset (preferably in writing).<sup>214</sup> Some suggest treating different digital assets differently.<sup>215</sup> Other differences of opinion arise with regard to where to include the inventory, how to provide for access to one’s digital footprint, and where to store the inventory. As for where to include the inventory, some suggest

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210. In rare instances, a digital item may fall within Louisiana’s abandoned property statute, the Uniform Unclaimed Property Act of 1997. LA. REV. STAT. ANN. § 9:151-170 (2008).

211. Goldman & Jamison, *supra* note 5, at 2. See also Hopkins, *supra* note 4, at 229 (stating that “traditional estate planning is not well equipped for the task” of dealing “with the unique challenges of digital assets”).

212. Haller, *supra* note 13; Wilkens, *supra* note 23, at 1042; Baldino, *supra* note 8, at 30. Phrased in the converse, in the absence of an inventory, digital assets could be lost forever. The well-known example is Leonard Bernstein, who died in 1990 with an electronic manuscript for his memoir, *Blue Ink*, in a password-protected file. Beyer, *supra* note 10, at 4; Beyer & Cahn, *When You Pass On*, *supra* note 13, at 41. To date, the password has not been located, and the file remains inaccessible. *Id.*

213. Baldino, *supra* note 8, at 30.

214. Walker & Blachly, *supra* note 19, at 182; Cahn, *supra* note 29, at 38–39.

215. Cahn, *supra* note 29, at 38–39.

incorporating the inventory into a will.<sup>216</sup> Others suggest merely referencing the inventory in the will.<sup>217</sup> Some suggest separate documents for the inventory, on the one hand, and the access instructions (like the website domain name, usernames, passwords, and answers to security questions), on the other.<sup>218</sup> Further, others recommend separate documents for usernames and passwords.<sup>219</sup> As for authorizing access to digital assets, many urge people to grant their succession representatives access to their digital footprints in their wills.<sup>220</sup> Others suggest appointing a digital executor, i.e., someone to act objectively on behalf of a decedent and ensure the proper transfer of his digital assets according to his wishes,<sup>221</sup> and some suggest granting the digital executor a power of attorney over the accounts.<sup>222</sup> Still others recommend that the decedent authorize his OSPs to disclose log-in information to the succession representative.<sup>223</sup> Some suggest storing the inventory, access information, and instructions in different locations, such as on hard copy, locally, or online. Others recommend storing them with a trusted person (possibly one's digital executor or attorney), in a safety deposit box, or with a digital afterlife company.<sup>224</sup>

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216. *Estate Planning in a Digital Era*, CTA, <http://ctainvest.org/home/insurance-estate-planning/estate-plan/Estate-Planning-in-a-Digital-Era.aspx> (last visited Oct. 23, 2013) [<http://perma.cc/ET9P-AUMY>] (archived Feb. 24, 2014).

217. Beyer & Cahn, *Digital Planning*, *supra* note 5, at 150; Beyer & Cahn, *When You Pass On*, *supra* note 13, at 42.

218. Baldino, *supra* note 8, at 30.

219. Beyer & Cahn, *Digital Planning*, *supra* note 5, at 151; Beyer & Cahn, *When You Pass On*, *supra* note 13, at 43.

220. Baldino, *supra* note 8, at 31.

221. CARROLL & ROMANO, *supra* note 7, at 100. Note, though, that the law does not currently recognize a digital executor. *Id.*

222. Hill, *supra* note 16.

223. Laise, *supra* note 27. According to this source, doing so will allow the succession representative to have copies of the contents of the digital items, rather than access to the account itself, which could violate certain statutes and the TOS. *Id.*

224. Hill, *supra* note 16; Walker & Blachly, *supra* note 19, at 182–83. Digital afterlife companies are growing in number and popularity. *See generally* B. Bonin Bough, *Digital Death and Digital Afterlife: Serious Business*, FORBES (Apr. 11, 2011, 6:35 PM), <http://www.forbes.com/sites/boninbough/2011/04/11/digital-death-and-digital-afterlife-serious-business/> [<http://perma.cc/QE5B-RTLJ>] (archived Mar. 6, 2014). Some of the best known are SecureSafe, AssetLock, and Legacy Locker. Sarah Kellog, *Managing Your Digital Afterlife: Cyber Footprint, Ownership, and Access*, DC BAR (Jan. 2013), <http://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/January-2013-digital-afterlife.cfm> [<http://perma.cc/7TFN-UGBL>] (archived Mar. 6, 2014). Though differences exist among them, there are common features. Each acts as an online safe deposit box by storing passwords and other digital items to be passed along to a beneficiary upon the owner's death. Hobson, *supra* note 135.

Despite its advantages, the inventory approach is theoretically and practically limited. Theoretically, the inventory model relies on an individual to plan for his digital footprint in advance, so it does not address the estate of the decedent who dies leaving behind no instructions. Most people do not keep track of their own digital footprints while alive, “let alone keep records sufficient to direct someone else to posthumously discern the situation.”<sup>225</sup> Even if a person does grant access to his digital footprint through an inventory with usernames and passwords or through a digital afterlife company, this is not the same as giving the digital assets themselves. As discussed in Part III above, many digital assets are nontransferable licenses that expire at death. As a result, a decedent following the inventory model is simply granting to someone access to something that technically no longer exists upon his death. Further, the decedent is, from the grave, potentially violating the TOS and subjecting someone else to potential criminal and civil liability under federal privacy statutes by following the inventory model.

The inventory model is also flawed from a practical perspective. It is burdensome in that the decedent must remember to update the inventory every time he creates a new digital item or changes a password. It also requires a tech-savvy succession representative,<sup>226</sup> and if the decedent includes the inventory in his will, that information could become public.<sup>227</sup> Including it in a will could also get expensive if an estate planning attorney is used, given the regular updates needed to keep an inventory current.<sup>228</sup> On the other hand, if an estate attorney is not used, the individual will need a working knowledge of state successions law, as this will dictate how he must update the will and, in turn, the inventory listed therein.<sup>229</sup> Additionally, the security of the inventory is worrisome. Even if it is not included in a public document like a will, the inventory could be lost if the device on which the file is stored is lost or broken.<sup>230</sup> Potentially more dangerous is the fact that the inventory model entails sharing passwords during life, a practice that risks premature access to one’s digital footprint,<sup>231</sup> rendering this

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225. Wilkens, *supra* note 23, at 1043.

226. Anne Eisenberg, *Bequeathing The Keys to Your Digital Afterlife*, N.Y. TIMES (May 25, 2013), [http://www.nytimes.com/2013/05/26/technology/estate-planning-is-important-for-your-online-assets-too.html?\\_r=0](http://www.nytimes.com/2013/05/26/technology/estate-planning-is-important-for-your-online-assets-too.html?_r=0) [<http://perma.cc/8G5F-UJ6B>] (archived Feb. 24, 2014); Walker & Blachly, *supra* note 19, at 183.

227. Maimes, *supra* note 14; Conner, *supra* note 8, at 320.

228. Conner, *supra* note 8, at 320–21; Joseph M. Mentrek, *Estate Planning in a Digital World*, 10 OHIO PROB. L. J. 195 (2009).

229. Beyer & Cahn, *Digital Planning*, *supra* note 5, at 150.

230. Haller, *supra* note 13.

231. Wilkens, *supra* note 23, at 1059.

model counterintuitive to security best practices.<sup>232</sup> Those using an online password storage service do not wholly ameliorate this issue, as this leads to one password becoming extremely powerful.<sup>233</sup> Storing with an attorney is also uncertain because some attorneys are hesitant to agree to this. As one attorney stated, “I don’t want to be responsible for storing people’s passwords and access codes . . . . If their account gets hacked I have no way of proving it wasn’t somebody on my staff who had access to that information.”<sup>234</sup>

Those using digital afterlife companies face a whole host of additional business, practical, and legal issues. First, the business model is questionable. While customers entrust digital afterlife companies with usernames and passwords, some criticize the industry as disreputable.<sup>235</sup> Others question the longevity of such companies,<sup>236</sup> given that their very existence “is dependent upon the whims and attention spans of their creators and creditors.”<sup>237</sup> Additionally, although some extol the security systems of such companies,<sup>238</sup> others worry about breaches.<sup>239</sup> Finally, some of these companies charge fees, excluding them as an option for some potential customers.

Practically speaking, digital afterlife companies leave much to be desired. For example, one left behind must know that the decedent had an account in the first place; lack of this knowledge would wholly defeat the purpose of having an account.<sup>240</sup> Also, as with a hard-copy inventory, the customer must continually update the information stored with the digital afterlife company.<sup>241</sup> And some of these companies

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232. Beyer & Cahn, *When You Pass On*, *supra* note 13, at 43 (“Repeatedly, we are told neither to keep written records of our passwords nor to share them with anyone.”); Beyer & Griffin, *supra* note 43, at 6.

233. Beyer, *supra* note 10, at 8.

234. Marshall, *supra* note 1 (quoting estate planning attorney Wendy Goffe).

235. The companies have been accused of offering “snake oil gimmicks” to customers and have been dubbed “a big fat lawsuit waiting to happen.” Walker & Blachly, *supra* note 19, at 185, 186 (quoting David Shulan, an estate planning attorney in Florida). One attorney proclaimed he “would relish the opportunity to represent the surviving spouse of a decedent whose eBay business was ‘given away’ by Legacy Locker to an online friend in Timbuktu.” *Id.*; Perrone, *supra* note 5, at 203.

236. Rex M. Anderson, *Digital Assets in Estates*, ARIZ. ATT’Y, March 2013, at 45; Haller, *supra* note 13.

237. Beyer & Griffin, *supra* note 43, at 6; Beyer & Cahn, *Digital Planning*, *supra* note 5, at 152. This concern is valid, as over a two year time frame, about one-third of the companies went out of business or merged. Beyer, *supra* note 10, at 10.

238. Haller, *supra* note 13.

239. Beyer & Cahn, *When You Pass On*, *supra* note 13, at 43; Beyer & Griffin, *supra* note 43, at 6; Eisenberg, *supra* note 226.

240. Haller, *supra* note 13. Some companies give customers a card for their wallet or files directing medical personnel or family members to report the death to the company. Wilkens, *supra* note 23, at 1060.

241. Wilkens, *supra* note 23, at 1060.

send out information to beneficiaries if the customer fails to respond to an “are you alive” notice, even when it could be that the customer simply mistakenly failed to respond.<sup>242</sup>

The digital afterlife business model also triggers legal issues. Though the creators of digital afterlife companies are diverse in terms of education and sophistication, they are typically not estate planners, which leads some to criticize the companies for misleading customers about the extent and legality of the services offered.<sup>243</sup> For example, although a person may believe that his account with one of these companies will validly transfer his digital footprint at his death, this is not true;<sup>244</sup> simply providing the information to access a digital footprint is not synonymous with actually transferring ownership of the digital items in it upon death.<sup>245</sup> Registering for a digital afterlife account cannot transfer digital items; that can be done only by a valid will that satisfies certain form requirements.<sup>246</sup> Furthermore, it is doubtful whether these companies can even validly provide access to digital items, as the very essence of their services violates many TOS<sup>247</sup> and possibly the statutes discussed in Part III, as well.<sup>248</sup>

### *B. Trust Model*

Another estate planning tool that a decedent could use is the creation of a trust. A trust “is the relationship resulting from the transfer of title to property to a person to be administered by him as a fiduciary for the benefit of another.”<sup>249</sup> The trust model is based on the notion that a trust and any assets validly in it survive the decedent.<sup>250</sup> One way to utilize this model is for the trust to be the registered user of digital items. However, that option would not work for digital items already registered to an individual user. Another option, at least with regard to transferrable digital items, is for the registered user to transfer

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242. Walker & Blachly, *supra* note 19, at 186; Perrone, *supra* note 5, at 203.

243. Roy, *supra* note 186, at 387–88. *See also* Hopkins, *supra* note 4, at 235 (stating that “very few of the [digital afterlife] services provide legal estate planning solutions”).

244. Beyer & Griffin, *supra* note 43, at 7; Roy, *supra* note 186, at 378.

245. Conner, *supra* note 8, at 318; Perrone, *supra* note 5, at 202.

246. *See* Walker & Blachly, *supra* note 19, at 181; Cahn, *supra* note 29, at 39. Some digital afterlife companies provide for a separate memorandum to be included in the will, but these are without legal effect in many states, absent certain formalities. Conner, *supra* note 8, at 318–19.

247. Kutler, *supra* note 10, at 1655; Cahn, *supra* note 29, at 38.

248. Laise, *supra* note 27.

249. LA. REV. STAT. ANN. § 9:1731 (2005).

250. Conner, *supra* note 8, at 319; Beyer & Cahn, *When You Pass On*, *supra* note 13, at 42.

the digital items into the trust during his life or, for those transferrable digital assets that do not expire at death, upon his death.

The trust model resolves a major problem of the inventory model in that it actually transfers the digital item in question from the decedent to his beneficiaries. However, it is not immune from theoretical and practical complications. Theoretically, the trust model may fail, at least with regard to OSPs that limit ownership and use to individuals.<sup>251</sup> Even when ownership by an entity is allowed, a trustee owner is a somewhat novel solution, which may cause delays in processing the decedent's succession while the OSP reviews unfamiliar legal documents and interprets how to apply the various privacy laws.<sup>252</sup> And just like the inventory model, it fails to address intestate successions, relies on advance planning, and requires continual updating, all of which are valid concerns.

The trust model also shares the inventory model's practical hitch of requiring that the decedent have a tech-savvy succession representative. Further, if the trust in question is an *inter vivos* trust, it triggers the same dangers of sharing log-in information as the inventory model. The trust model also does not resolve the issue of transferring those digital items that are nontransferable (during life or upon death) per the TOS, nor does it preclude liability under the privacy statutes mentioned in Part III. Finally, the trust model has been described as "overkill" for those with a small digital footprint.<sup>253</sup>

## V. POTENTIAL RESOLUTIONS

Because estate planning is currently the only option in Louisiana, a better resolution to the digital footprint issue is needed. Others have offered several potential options, including company policy changes, an *ad hoc* judicial approach, a federal statute, state statutes, or a uniform statute. This Section presents an overview of each.

### A. Company Policy Changes

The easiest solution to the digital footprint issue is for OSPs to revise their terms, preferably in a uniform way. Lawyers and leaders of the bar are hopeful that discussion among stakeholders will lead, at a minimum, to a set of "industry guidelines" and "best practices."<sup>254</sup> Some commentators have suggested that those best practices should allow users the power to designate what will happen to their accounts

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251. Haller, *supra* note 13.

252. *Id.*

253. Beyer & Griffin, *supra* note 43, at 5.

254. Cohen, *supra* note 11.

upon death.<sup>255</sup> This decision would function in a similar fashion to the choices that users make regarding their privacy settings on certain online accounts.<sup>256</sup> If all of the OSPs did this, then more individuals would at least consider the issue.<sup>257</sup> The problem, of course, is that there is no mechanism to mandate this, leaving businesses free to self-regulate and consumer advocacy as the sole means of persuasion.<sup>258</sup> Some OSPs have indicated a willingness to respond to such persuasion<sup>259</sup> and have changed their TOS on their own initiative. The most notable of these are the recent changes to Google's policy.

Google's Inactive Account Manager, nicknamed "Google Death,"<sup>260</sup> allows Google users to pre-designate what will happen to their accounts after a certain period of inactivity, ranging from 3 to 12 months.<sup>261</sup> Upon the inactivity period's expiration and after attempting to reach the user via text and secondary e-mail, Google will respect the user's designation to either terminate the account or send the data to designated persons.<sup>262</sup>

One commentator, Gerry Beyer, applauded Google and urged other OSPs to follow its lead.<sup>263</sup> He suggested that OSPs provide an "easy

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255. Beyer & Cahn, *Digital Planning*, *supra* note 5, at 154; Mazzone, *Facebook's Afterlife*, *supra* note 41, at 1677–78.

256. Mazzone, *Facebook's Afterlife*, *supra* note 41, at 1677–78.

257. See CARROLL & ROMANO, *supra* note 7, at 173.

258. Mazzone, *The Right to Die Online*, *supra* note 55, at 1. Some believe that existing company policies do not protect users. *Id.* (discussing Facebook).

259. Sherry, *supra* note 13, at 229. For example, after Instagram (a company owned by Facebook) tried to change its TOS to give advertisers free access to photos stored on their site, users complained such that the company acquiesced and revised the TOS again. Haworth, *supra* note 21, at 23. In September 2013, Facebook announced its plans to change its TOS to nearly mirror those in the failed Instagram TOS. Nancy Kim, *Happy Groundhog Day, Facebook!*, CONTRACTSPROFBLOG (Sept. 13, 2013), [http://lawprofessors.typepad.com/contractsprof\\_blog/2013/09/happy-groundhogs-day-face-book.html](http://lawprofessors.typepad.com/contractsprof_blog/2013/09/happy-groundhogs-day-face-book.html) [<http://perma.cc/4429-3AV3>] (archived Feb. 24, 2014). This announcement garnered protests from users and privacy advocacy groups, and six privacy groups wrote to the Federal Trade Commission (FTC) to complain. *Id.* The FTC has announced that it will investigate whether Facebook's proposed TOS violate an agreement that the company reached with the FTC in 2011. *Id.* Only time will tell whether Facebook will voluntarily retreat from its proposed TOS.

260. Will Oremus, *Have You Written Your Google Will?*, SLATE (Apr. 11, 2013, 6:07 PM), [http://www.slate.com/blogs/future\\_tense/2013/04/11/google\\_death\\_in\\_active\\_account\\_manager\\_lets\\_you\\_plan\\_digital\\_afterlife.html](http://www.slate.com/blogs/future_tense/2013/04/11/google_death_in_active_account_manager_lets_you_plan_digital_afterlife.html) [<http://perma.cc/3WRX-DH6U>] (archived Feb. 24, 2014).

261. Andreas Tuerk, *Plan Your Digital Afterlife with Inactive Account Manager*, GOOGLE PUB. POL'Y BLOG (Apr. 11, 2013), <http://googlepublicpolicy.blogspot.com/2013/04/plan-your-digital-afterlife-with.html> [<http://perma.cc/TDW8-HKU5>] (archived Feb. 24, 2014).

262. *Id.*

263. Beyer, *supra* note 10, at 19.



method at the time a person signs up for a new service so the person can designate the disposition of the account upon the owner's . . . death."<sup>264</sup> Although this is a preferred solution, "market pressure may be insufficient to discipline businesses," and some smaller OSPs may not have the resources to emulate Google's approach.<sup>265</sup> Further, even for those OSPs enacting such policies, the scope may be somewhat limited because there is no requirement that existing users take advantage of the new service.

### B. *Ad Hoc Decisions*

Another option is to simply leave this issue for the courts to decide on an *ad hoc* basis. However, this solution is unattractive for two reasons. First, such an approach runs counter to one of the basic tenets of Louisiana's civil law system, according to which all sources of law are not created equally. The civil law system distinguishes between primary and secondary sources of law, and judicial opinions are merely a secondary source,<sup>266</sup> meaning they are not binding and merely serve as persuasive authority.<sup>267</sup> As a result, the *ad hoc* approach could lead to inconsistent decisions among different courts and a resulting lack of certainty for Louisiana citizens. This, in turn, could make it difficult for attorneys to advise their clients.

Second, *ad hoc* decisions would be a strain on the judiciary. As already mentioned, the number of digital items has grown significantly over the years and is expected to continue to do so in the future.<sup>268</sup> Further, more and more Internet users with digital footprints are going to continue to die. Thus, this issue is only going to become more prevalent and problematic as time passes. Leaving the issue for judicial resolution on an *ad hoc* basis would be burdensome for the court system.

### C. *Federal Statute*

Some have suggested that a federal statute would remedy the digital footprint issue. The Commerce Clause should allow Congress the authority to legislate on this topic,<sup>269</sup> and this is definitely an attractive solution because it would ensure uniformity and foster

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264. *Id.*

265. Tarney, *supra* note 43, at 779. See also Kutler, *supra* note 10, at 1656.

266. LA. CIV. CODE arts. 1–3 (2014); *id.* art. 1, cmt. b.

267. *Id.* art. 1, cmt. b.

268. See *supra* note 9.

269. Mazzone, *Facebook's Afterlife*, *supra* note 41, at 1681.

certainty.<sup>270</sup> Given the global nature of the digital footprint issue, a federal statute could be a “better and clearer source of ownership rights.”<sup>271</sup>

However, at this time, there is “little movement” in Congress on this issue; actually, one Congressman has called for a moratorium on legislation addressing one’s digital footprint.<sup>272</sup> Additionally, there is a lack of consensus on the appropriate substance of such a statute and concern that a federal statute may be politically motivated and, as a result, impractical and adopted without close attention to detail.<sup>273</sup> Ultimately, commentators express a lack of faith in Congress’s ability to craft a substantively appropriate statute.<sup>274</sup>

Further, it is possible that a federal statute could trigger federalism problems under the Tenth Amendment to the U.S. Constitution.<sup>275</sup> After all, property and successions are areas of law traditionally reserved to the states.<sup>276</sup> Depending on the substance of a federal statute on a decedent’s digital footprint, it is possible that such a statute could impinge on the states’ rights.

#### D. State Statutes

A converse approach could be to allow Louisiana to resolve the digital footprint issue in its own way. There has been a recent movement toward this in other states,<sup>277</sup> and a small number of state

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270. See, e.g., Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 615–16, 618 (1989).

271. Hopkins, *supra* note 4, at 241.

272. Beyer, *supra* note 10, at 19–20.

273. Ray, *supra* note 3, at 602.

274. See Sherry, *supra* note 13, at 244; see also Darrow & Ferrera, *supra* note 127, at 318.

275. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”).

276. See, e.g., *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 517 (1938) (“[T]he regulation of rights in property is a matter reserved to the States . . .”).

277. In recent years, numerous states considered digital footprint legislation. Gerry W. Beyer, *Virginia and Nevada Pass Bills Regarding Management of Digital Assets Post Mortem*, WILLS, TR. & EST. PROF. BLOG (Aug. 2, 2013), [http://lawprofessors.typepad.com/trusts\\_estates\\_prof/2013/08/as-i-previouslydiscussed-there-has-been-an-increase-in-digital-life-technology-should-play-an-important-role-in-estate-plan.html](http://lawprofessors.typepad.com/trusts_estates_prof/2013/08/as-i-previouslydiscussed-there-has-been-an-increase-in-digital-life-technology-should-play-an-important-role-in-estate-plan.html) [<http://perma.cc/3KQK-N87K>] (archived Feb. 24, 2014). As discussed in this Section, Nevada’s legislation was enacted. Another state, Virginia, recently enacted very narrow legislation to allow for access to a minor’s account. VA. CODE ANN. § 64.2-109 (Westlaw 2014). Additionally, effective May 21, 2013, the Maine Legislature appointed a commission to study the legal impediments to the disposition of digital assets upon an individual’s death or incapacity and develop legislative recommendations by December 1, 2013. H.P. 601, 126th Leg., 1st Reg. Sess. (Me.

legislatures have enacted on-topic statutory provisions, which are further discussed in this Section. Such statutes alleviate federalism concerns. They also have beneficial provisions that should be considered in fashioning a resolution to the digital footprint. As such, Louisiana should consider them, but the concerns triggered by them, individually and collectively, should prevent the State from adopting any of the existing statutory provisions *in toto*.

A few state statutes address only e-mail. For example, California's 2002 statute requires that e-mail providers give a 30-day notice prior to terminating any account.<sup>278</sup> It does not provide for anyone to access the decedent's account. Further, the mandated notice may be sent to the e-mail address in question, and therefore, if the decedent has not left behind his username, password, and access instructions, the notice will not be seen.<sup>279</sup> Connecticut's and Rhode Island's statutes also apply only to e-mail.<sup>280</sup> However, both go further than California's provisions by requiring e-mail service providers to provide a decedent's succession representative with access to or copies of the contents of the decedent's account.<sup>281</sup> Before doing so, Connecticut requires receipt of either (1) a written request for such access or copies by the executor or administrator, a copy of the death certificate, and a certified copy of the appointment of the executor or administrator or

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2013). The other states' proposed legislations did not pass. *See* S.B. 29, 2013 Reg. Sess. (Md. 2013) (As of February 18, 2013, the bill had received an "unfavorable" report by the Senate Judicial Proceedings Committee.); S.B. 2313, 187th Gen. Assemb., (Mass. 2012) (As of January 1, 2013, the bill was in the House and "no further action was taken," leaving its current status as "Referred to House Committee on Steering, Policy, and Scheduling."); S.B. 293 (Mich. 2013); Legis. B. 783, 102nd Legis. (Neb. 2012) ("indefinitely postponed" as of April 18, 2013); H.B. 116 (N.H. 2013) ("laid on table" as of January 30, 2013); Assemb. B. 2943, 2012–2013 Reg. Sess. (N.J. 2012) (passed by the Assembly June 21, 2012 and referred to the Senate Commerce Committee on June 25, 2012, after which time no further action has been reported); N.Y. State Assemb. 823, 2012–2013 Reg. Sess. (N.Y. 2013) (referred to the judiciary committee on January 9, 2013, with no further action reported, such that status is currently "unknown"); S.B. 279, 2013–2014 Sess. (N.C. 2013) (although this bill passed, the digital assets portion was removed beforehand); H.B. 1455, 63rd Legis. Assemb. (N.D. 2013) (bill failed on April 9, 2013); S.B. 54, 2013 Reg. Sess. (Or. 2013) (bill was in committee upon adjournment); H.B. 2580, Reg. Sess. 2011–2012 (Pa. 2012) (referred to judiciary committee on August 23, 2012, with no further action such that status is currently "unknown").

278. CAL. BUS. & PROF. § 17538.35 (Westlaw 2014).

279. Tarney, *supra* note 43, at 788.

280. CONN. GEN. STAT. ANN. § 45a-334a(b) (Westlaw 2014); R.I. GEN. LAWS ANN. § 33-27-3 (Westlaw 2014). *But see* Wu, *supra* note 10, at 6 (noting that "[s]ince Facebook, Twitter, and LinkedIn provide direct messaging services, they are likely to be considered electronic mail service providers under these statutes").

281. CAL. BUS. & PROF. § 17538.35; CONN. GEN. STAT. ANN. § 45a-334a(b); R.I. GEN. LAWS ANN. § 33-27-3.

(2) an order of the probate court having jurisdiction over the decedent's estate.<sup>282</sup> The Rhode Island statute requires receipt of both and also requires that the order designate the executor or administrator as agent for the decedent under the SCA and mandate indemnity by the estate in favor of the electronic mail service provider.<sup>283</sup> The Connecticut statute may run afoul of the SCA because it makes no attempt to comply.<sup>284</sup> Further, under both statutes, the testator's role is unclear; that is to say, there is no direction as to whether a testator can prevent access or require the e-mail provider to transmit the e-mails to someone other than the succession representative.<sup>285</sup> Additionally, the phrase "access or copies," clearly disjunctive, could generate confusion as to who gets to decide whether access or copies will be provided, and if the succession representative is allowed access, it is not clear exactly what the succession representative can do with regard to the account thereafter.<sup>286</sup>

Other statutes extend their applicability beyond e-mail and provide for greater powers to the succession representative. For example, the Oklahoma statute allows the succession representative, "where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any email service websites."<sup>287</sup> The language "where otherwise authorized" has generated some confusion.<sup>288</sup> Some believe that this means the decedent would have to specifically provide for access to his succession representative before it would be granted, yet most decedents die intestate. Idaho's statute is identical except that it does not contain the phrase "where otherwise authorized"; instead, it defaults in favor of access yet allows for exceptions to access where "restricted or otherwise provided by the will or by an order in a formal proceeding."<sup>289</sup> It also requires that the succession representative act reasonably for the benefit of the interested persons.<sup>290</sup> These two statutes improve upon others by clarifying the succession representative's authority and allowing the decedent more autonomy.

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282. CONN. GEN. STAT. ANN. § 45a-334a(b).

283. R.I. GEN. LAWS ANN. § 33-27-3.

284. See *supra* Part III.

285. Cahn, *supra* note 29, at 38.

286. Beyer & Cahn, *Digital Planning*, *supra* note 5, at 148.

287. OKLA. STAT. ANN. tit. 58 § 269 (Westlaw 2014).

288. Dazza Greenwood, *State Statute Empowers Executors to Conduct Digital Identities of Deceased*, DIGITAL EST. RESOURCE (Jul. 11, 2011), <http://www.digitalestateresource.com/2011/07/state-statute-empowers-executors-to-conduct-digital-identities-of-deceased/> [http://perma.cc/7SN2-W4EW] (archived Feb. 24, 2014). Mazzone, *Facebook's Afterlife*, *supra* note 41, at 1674-75.

289. IDAHO CODE ANN. § 15-3-715 (Westlaw 2014).

290. *Id.*

However, these statutes have shortcomings. First, they do not, by their terms, require any proof of the decedent's death. Second, they do not allow for a decedent to grant access to someone other than his succession representative. Third, they may run afoul of the SCA because they make no attempt to comply.<sup>291</sup> Fourth, the statutes' specific lists of digital items and lack of definitions could potentially limit the statutes' applicability and quickly render them obsolete as technology continues to evolve.<sup>292</sup>

Indiana's legislation is even broader. It applies to any custodian who electronically stores documents or other information of another person. Additionally, it requires that the succession representative be given access to or copies of such stored materials upon receipt of (1) a written request for such access or copies by the succession representative, a copy of the death certificate, and a certified copy of the succession representative's letters testamentary or (2) an order of the probate court having jurisdiction over the decedent's estate.<sup>293</sup> Although this statute requires proof of the decedent's death, it is not without criticism. First, it is unclear whether a testator can prevent access altogether or require the OSP to transmit the material to someone other than the succession representative. Second, the statute is ambiguous as to who is allowed to decide whether access or copies should be provided, and in the event that the succession representative is allowed access, it is not clear exactly what he can do with regard to the account thereafter. Third, like most of the statutes, the Indiana statute may run afoul of the SCA because it makes no attempt to comply. Finally, it lacks definitions of the words "documents" and "information," leaving open questions about its applicability.<sup>294</sup> Although an open-ended definition (or lack thereof) allows the law to remain relevant for new technologies and new types of digital items, it can also create uncertainty and confusion as to which items are covered.<sup>295</sup>

Nevada has enacted the newest legislation, effective October 1, 2013. This statute, in the absence of contrary directions in a decedent's will or a court order, authorizes a decedent's succession representative

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291. See *supra* Part III.

292. Beyer & Cahn, *Digital Planning*, *supra* note 5, at 144; Greenwood, *supra* note 288. As one commentator noted, "The statute does not reach stored value accounts (like PayPal), cloud storage services (like Dropbox), or non-website Internet applications in which online assets can be stored (like Second Life or World of Warcraft)." Wu, *supra* note 10, at 6.

293. IND. CODE ANN. § 29-1-13-1.1 (Westlaw 2014).

294. See, e.g., Ray, *supra* note 3, at 603; Mazzone, *Facebook's Afterlife*, *supra* note 41, at 1674 (questioning whether social networking would qualify as "documents").

295. Beyer & Cahn, *Digital Planning*, *supra* note 5, at 144.

to direct the termination of the decedent's accounts, including those on social networking, web log service, Microblog service, short message service, electronic mail service, or any similar electronic or digital item of the decedent, but it does not allow him to terminate any of the decedent's financial accounts.<sup>296</sup> This statute is broad, defaults in favor of access, and allows a decedent to prevent access. However, it does not require any documentation of the decedent's death, does not allow for the decedent to require the OSP to allow access to someone other than the succession representative, potentially violates the SCA, and most importantly, does not allow for any activity by the succession representative, except for termination of the account.

Beyond the criticisms levied at each individual statute, the collective group is subject to several more. First, a state statute may not even apply. After all, the TOS usually include a choice-of-law provision.<sup>297</sup> Thus, where such a provision is respected, it is likely that the substantive law of a state with a digital footprint statute will not apply. Even if a digital footprint statute is applied in spite of a choice-of-law provision, some worry that the existing statutes do nothing to address the legal issues mentioned in Part III. For example, the statutes do not resolve the issue of whether digital items are property, may directly conflict with the TOS by allowing a succession representative access,<sup>298</sup> and do not address privacy statutes.<sup>299</sup>

As a practical matter, some criticize the notion of having numerous (potentially different) state laws in place, as this could be inefficient and costly and could reduce certainty.<sup>300</sup> Some have expressed concern that by defaulting to access, some of these statutes do not consider the wishes of the deceased.<sup>301</sup> Some have questioned the statutes' longevity, as they are creatures of the time period in which they were

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296. S.B. 131, 2013 Reg. Sess. (Nev. 2013).

297. Some of the TOS choose California law, which has only the dated and narrow statute discussed above. See CAL. BUS. & PROF. § 17538.35 (Westlaw 2014).

298. Cahn, *supra* note 29, at 38; Mazzone, *Facebook's Afterlife*, *supra* note 41, at 1676; Mazzone, *The Right to Die Online*, *supra* note 55, at 14; Beyer & Griffin, *supra* note 43, at 7. It may be argued that decedents, by agreeing to the TOS, waived their rights under these statutes. Beyer & Cahn, *Digital Planning*, *supra* note 5, at 146. However, as to digital items created before a statute's enactment, they arguably have not, as that would entail an anticipatory waiver. Some claim that the TOS take precedent over state laws, Hill, *supra* note 16, but one commentator has predicted that this very issue will be "the real breakout legal battle" in the digital footprint arena. Sherry, *supra* note 13, at 215 (quoting Evan Carroll in a verbal interview).

299. Haller, *supra* note 13 (mentioning the CFAA); Beyer, *supra* note 10, at 12 (noting that "[w]hile state law can clarify that the fiduciary is an authorized user, this is an issue of federal law").

300. Ray, *supra* note 3, at 602.

301. Kutler, *supra* note 10, at 1666.

enacted and are limited to technology that existed at that time.<sup>302</sup> Others have criticized them as lagging behind technology and creating confusion and unnecessary expense.<sup>303</sup>

Ultimately, these statutes are still in their infancy.<sup>304</sup> As Professor Naomi Cahn noted, “[W]e’re still in the process of testing how those laws operate. They don’t cover all Internet accounts and the laws are new enough that they’re just in the process of being worked out.”<sup>305</sup> One commentator has dubbed the statutes “reactionary” and worries that they could exacerbate the digital footprint problems.<sup>306</sup> Another has expressed concern that they are “toothless.”<sup>307</sup> Some state legislators share this concern, pondering whether such statutes are premature and potentially unenforceable.<sup>308</sup>

### *E. Uniform Law*

Touted as the “ideal vehicle” to resolve the digital footprint issue, another option is the creation of a uniform law.<sup>309</sup> Currently, the Uniform Law Commission (ULC) is working on such a law, the Uniform Fiduciary Access to Digital Assets Act (Act).<sup>310</sup> This Act is

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302. Beyer & Cahn, *Digital Planning*, *supra* note 5, at 146.

303. Shah, *supra* note 34; Hopper, *supra* note 133.

304. Sillin, *supra* note 174.

305. Hopper, *supra* note 133.

306. Sherry, *supra* note 13, at 190.

307. Perrone, *supra* note 5, at 204.

308. Beyer, *supra* note 10, at 15.

309. Tarney, *supra* note 43, at 798.

310. The ULC is made up of attorneys, judges, legislators, legislative staff, and professors appointed by state governments. Its purpose is to research and draft “non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.” Perrone, *supra* note 5, at 201. It then encourages the enactment of uniform state laws. *Id.* This particular proposed uniform law began its journey in May 2011 when Jim Lamm and Gene Hennig submitted a proposal for a uniform law on the digital footprint issue. See Memorandum from Suzanne Brown Walsh, Chair, and Professor Naomi Cahn, Reporter of the ULC FADA Comm., to Comm. of the Whole, 2013 ULC Annual Meeting (May 23, 2013), available at [http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013AM\\_FADA\\_IssuesMemo.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013AM_FADA_IssuesMemo.pdf) [<http://perma.cc/BC74-H7VM>] (archived Feb. 24, 2014). In January 2012, after realizing the uncertainty surrounding the issue and the need for fiduciaries to have clear powers to access digital information, the ULC approved a resolution to form a committee to study the issue. Haworth, *supra* note 21, at 11. After reviewing the study committee’s report, the ULC then appointed a drafting committee, the Fiduciary Powers and Authority to Access Digital Information study committee, to prepare a uniform law. See Memorandum from Suzanne Brown Walsh, Chair, and Professor Naomi Cahn, Reporter of the ULC FADA Committee, *supra*. Although initially allowed to be either free standing or an amendment to existing ULC laws, such as the Uniform Probate Code, the Uniform Trust Code, the Uniform Guardianship and Protective Proceedings Act, and the Uniform Power of Attorney

currently in draft form and in the process of possibly becoming a uniform law.<sup>311</sup> If so, it would grant to certain fiduciaries specified authority over another's digital footprint.<sup>312</sup>

More particularly, the Act provides that, if granted authority, a decedent's succession representative steps into the shoes of the decedent with regard to his online digital footprint and where the succession representative has authority over a decedent's digital device, he may access any record on that device.<sup>313</sup> The Act also provides that a succession representative has the "lawful consent" of the decedent to access his digital footprint and is an "authorized user" of the same, language that mirrors that of the federal privacy statutes (the CFAA and the SCA) discussed in Part III.<sup>314</sup>

As to the succession representative's scope of power, the Act provides two alternatives. Under Alternative A, a succession representative would be allowed control over the decedent's digital footprint and have the ability to obtain access to both the records and contents of the same unless the decedent provided otherwise in a will or a court prohibited this.<sup>315</sup> Under Alternative B, a succession representative would be allowed to access, manage, deactivate, and delete the decedent's digital footprint unless prohibited from doing so by the will of the decedent, a court order, or any other law of the

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Act, *Committees: Fiduciary Access to Digital Assets*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Committee.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets> (last visited Oct. 24, 2013) [<http://perma.cc/9MT8-EJP4>] (archived Feb. 24, 2014), the current draft is a stand-alone act. Memorandum from Suzanne Brown Walsh, Chair, and Professor Naomi Cahn, Reporter of the ULC FADA Committee, *supra*.

311. *ULC Drafting Process*, UNIFORM L. COMMISSION, [http://www.uniformlaws.org/Narrative.aspx?title=ULC Drafting Process](http://www.uniformlaws.org/Narrative.aspx?title=ULC%20Drafting%20Process) (last visited Jan. 11, 2014) [<http://perma.cc/AT2U-MXLZ>] (archived Mar. 7, 2014). To become a uniform act, it must be debated at another Annual Meeting and approved by the Committee of the Whole and a majority of states present (and no less than 20 states total). The plan is for the ULC to have a final draft for state legislatures to consider by next summer. Steinmetz, *supra* note 137.

312. Tyler Beas, *Gone, but Social Media Not Forgotten: Social Media Estate Planning Update*, LEXOLOGY (Mar. 1, 2013), <http://www.lexology.com/library/detail.aspx?g=93332b62-2aee-43af-abdf-9dbffa01c143> [<http://perma.cc/P7MR-T8CE>] (archived Feb. 24, 2014). Besides succession representatives, these fiduciaries also include conservators, agents, and trustees, but since those fiduciaries represent living persons, a discussion of them is beyond the scope of this Article.

313. *Fiduciary Access to Digital Assets Act Draft*, § 3, presented at 2013 National Conference of Commissioners on Uniform State Laws Annual Meeting, *available at* [http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013AM\\_FADA\\_Draft.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013AM_FADA_Draft.pdf) [<http://perma.cc/73LG-HEL7>] (archived Feb. 24, 2014).

314. *Id.* § 3 cmts.

315. *Id.* § 4.



state.<sup>316</sup> Finally, the Act grants OSPs immunity for any actions taken pursuant to the Act.<sup>317</sup>

Proponents believe that the Act will provide guidance to courts and solve problems of inefficiency, excessive costs, and uncertainty in the outcome when dealing with multiple states' laws.<sup>318</sup> The Act has numerous advantages. It extends to all digital property<sup>319</sup> and at least implicitly requires proof of death.<sup>320</sup> It also allows the decedent to prevent access (although it requires the decedent to do so via a will, denying protection to the intestate decedent or to the decedent whose will is invalid). Another benefit of the Act is that it allows the succession representative control over the digital property, not just access to or copies of it (although there may be some question as to what, exactly, "exercise control" means). The indemnity provision is also beneficial because it should encourage OSPs to comply.<sup>321</sup>

Support for the Act, however, is far from universal, and the concerns of critics vary. Some worry about its longevity, noting that it will need "constant monitoring and updating" as technology continues to evolve.<sup>322</sup> It is too limited in that it only grants authority to the succession representative. Thus, it precludes decedent autonomy to name someone else (or numerous others) as the appropriate person to access his digital footprint or specific digital assets within it. Others worry that it is too broad, giving "nearly unfettered access" to the succession representative, which could violate the privacy of not only

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316. *Id.* In the event that the Act is triggered, the succession representative must submit a written request, along with a certified copy of the instrument granting representative powers. *Id.* § 8 and comments thereto. The OSP must comply within 60 days of receipt of the request. *Id.* Failure to do so allows the succession representative the right to apply to the court for a compliance order. *Id.*

317. *Id.* § 9. Note that the drafting committee also believes that the Act will comply with comparable state privacy laws as well. *Id.* § 9 cmts.

318. Ray, *supra* note 3, at 605 (explaining that a uniform law "reduces strain in the legal system and reduces costs for the applicable social media or electronic storage companies that must deal with these issues across the nation").

319. The definition of "digital property" includes both "digital accounts" (defined as "an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information to which the account holder has access") and "digital assets" (defined as "information created, generated, sent, communicated, received, or stored by electronic means on a digital device or system that delivers digital information," including a contract right). Fiduciary Access to Digital Assets Act Draft, *supra* note 313, § 2.

320. It actually only requires a certified copy of the letter of appointment of the representative. However, in the case of a death, obtaining that letter would presumably first require proof to the issuing court that a person had died. *Id.* § 8.

321. Haworth, *supra* note 21, at 27.

322. See Comments to the draft Fiduciary Access to Digital Assets Act from Richard and Diane Rash, *supra* note 159.

the decedent but also the person with whom he communicated.<sup>323</sup> Additionally, although it attempts to resolve the TOS issues by providing that the succession representative's control over a digital item would not be a "transfer," a statute arguably should not be able to, after the fact, change the meaning of the TOS that the decedent consented to before his death.<sup>324</sup>

Finally, although the Act attempts to comply with the CFAA and SCA, whether it succeeds in doing so is up for debate. The SCA allows the OSP to disclose the contents of an account only with the consent of the originator, addressee, or intended recipient,<sup>325</sup> and the Act attempts to provide that the succession representative has the consent of the decedent. Yet, unless the decedent provided this in his will or has expressed a preference that his information be shared posthumously, this is inaccurate.<sup>326</sup> Therefore, the Act should arguably not apply to the intestate decedent or to one who did not indicate his preferences.<sup>327</sup> Further, some question whether a court would find a state law controlling, given the existing federal statutes.<sup>328</sup>

## VI. PROPOSED SOLUTION

While the proffered solutions are logical and innovative, an appropriate solution to the digital footprint issue begins with the realization that the problems triggered by a decedent's digital footprint are many, and the problems, in turn, trigger analyses from a multitude of areas of substantive law. As detailed in Part III, the three major legal problems triggered by the digital footprint issue are: (1) whether digital items are property, (2) the effect of the TOS that the decedent entered into before his death, and (3) the effect of privacy statutes. Ultimately, there is no quick-fix, and the possible solutions discussed above do not address all three major legal problems. However, there is much value

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323. Letter from Allison S. Bohm, Advocacy & Policy Strategist, American Civil Liberties Union, to Suzanne Brown Walsh, Chair, & Professor Naomi Cahn, Reporter, Unif. Law Comm'n (July 3, 2013), *available at* [http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013jul3\\_FADA\\_Comments\\_ACLU.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013jul3_FADA_Comments_ACLU.pdf) [<http://perma.cc/QEX7-EF9W>] (archived Feb. 24, 2014).

324. Fiduciary Access to Digital Assets Act Draft, *supra* note 313, § 3 and comments thereto.

325. 18 U.S.C. § 2702(b)(3) (2006).

326. Letter from Steve DelBianco, Exec. Dir., NetChoice, Carl M Szabo, Policy Counsel, NetChoice, & James J. Halpert, General Counsel, State Privacy & Security Coalition, to Suzanne Brown Walsh (July 8, 2013), *available at* [http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013jul\\_FADA\\_NetChoice\\_Szabo%20et%20al\\_Comments.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2013jul_FADA_NetChoice_Szabo%20et%20al_Comments.pdf) [<http://perma.cc/H4UT-LC2Q>] (archived Feb. 24, 2014).

327. *Id.*

328. *Id.*

to be found in the groundwork that has already been laid by commentators, industry experts, state legislatures, and drafters of the Act. Cobbling together the most valuable of their contributions and adding some unique provisions could lead to a comprehensive action plan that may better address the digital footprint issue. After all, “new technologies may require new approaches to old problems.”<sup>329</sup> The digital footprint issue requires a two-front attack: one grounded in both federal and state law.

Federal action is required to address the issues presented by the federal privacy statutes, the CFAA and SCA, both of which presumably (and probably inadvertently) preclude one from accessing a decedent’s digital footprint.<sup>330</sup> While some state statutes and the Act attempt to comply with these federal statutes, such efforts arguably cannot trump an existing federal statute. Therefore, Congress should amend the CFAA and SCA to carve out exceptions for state digital footprint statutes. That is to say, both federal statutes should be amended to specifically provide that one who accesses a decedent’s digital footprint in compliance with a state statute will not violate either the CFAA or the SCA. As to the CFAA, it could be amended to proclaim such action “authorized”; as to the SCA, it could be amended to proclaim such action “authorized” and “consented to.” This approach would be similar to that of the Act. However, the Act, if adopted in a given state, would apply only in that state; amending the CFAA and SCA would affect a resolution nationwide and would alleviate any federal supremacy concerns. That would resolve one area of substantive law problems presented by the digital footprint issue. Congress should also take it further. As mentioned in Part V, because a decedent’s digital footprint triggers legal issues in the realm of property and estate law, resolving the digital footprint issue falls within the purview of the states according to the Tenth Amendment. Thus, notions of federalism and comity should limit congressional willingness to dictate the fate of digital assets. However, some of the benefits of a federal statute could be realized if Congress would enact a statute recognizing the power and legitimacy of existing state digital asset laws and those that may be enacted in the future.

Federal action is just part of the solution. Once Congress amends existing privacy statutes and puts its weight behind state statutes, states must then do their part. Louisiana, like other states, needs a digital footprint statute, but the content of that statute is “the million dollar question.”<sup>331</sup> According to Professor Cahn, “If you’re going to be

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329. Letter from Allison S. Bohm, *supra* note 323.

330. *See supra* Part III.

331. Cohen, *supra* note 11 (quoting Doug Surtees, a wills lawyer and associate dean of law at the University of Saskatchewan).

creating a new law that deals with what happens to digital assets when someone can no longer manage them, you might as well be as comprehensive as possible . . . .<sup>332</sup>

The first thing Louisiana should do in its statute is to ensure that the statute will apply even in the face of TOS that contain choice-of-law provisions. Louisiana already has a tool in place to do this. Louisiana Civil Code article 3540 provides that the parties' choice of law will be respected "except to the extent that law contravenes the public policy of the state whose law would otherwise be applicable under Article 3537."<sup>333</sup> That article, in turn, provides for the applicable law to be the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.<sup>334</sup> Given Louisiana's strong interest in the orderly administration of its deceased domiciliaries' estates, it is likely that its law would be applicable under article 3537. Thus, Louisiana could amend its conflict-of-laws articles to specifically proclaim that applying the law of any other state contravenes the state's public policy when it comes to digital footprints.<sup>335</sup>

After ascertaining the applicability of its own law on the subject, Louisiana should enact a revised statute to govern a decedent's entire digital footprint. Thus, relevant terms should be defined, and the resulting definitions should "be broad enough to evolve with online innovation and be clear enough for lawyers, online service providers, and the general public to understand what is included under the definition[s]."<sup>336</sup> Louisiana should look to the definitions in the Act as a starting point. Under the latest draft, "digital property" is defined as "the lawful ownership and management of and rights related to a digital account and digital asset."<sup>337</sup> "Digital account," in turn, is defined as "an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information to which the account holder has access," and "digital asset" is defined as "information created, generated, sent, communicated, received, or stored by electronic means on a digital device or system that delivers digital information."<sup>338</sup> While these definitions are an excellent first step, one of the difficulties in defining terms in a technology-related statute is the risk that the definitions chosen will become obsolete in short order as technology continues to outpace the law. Therefore,

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332. Beyer, *supra* note 277.

333. LA. CIV. CODE art. 3540 (2014).

334. *Id.* art. 3537.

335. Louisiana is no stranger to making public policy proclamations in its conflict-of-laws articles. *See, e.g., id.* art. 3520.

336. Haworth, *supra* note 21, at 3.

337. Fiduciary Access to Digital Assets Act Draft, *supra* note 313, § 2.

338. *Id.*

Louisiana should extend these definitions to capture digital items that may not yet be popular or may not yet even exist. In that vein, the Legislature should consider incorporating catch-all language into the definitions. The Nevada and Virginia statutes present viable options: “any similar electronic or digital asset” or “other online accounts or comparable items as technology develops.”<sup>339</sup> While such open-ended phrases may be subject to criticism as vague and potentially over-inclusive, using them would serve the critical purpose of omitting the need to constantly amend the statute as technology continues to develop.

After defining the relevant terms, the Louisiana statute should clarify the place of one’s digital footprint within the realm of property and estate law. As discussed in Part III, typically, if a thing is property, it is susceptible of ownership. If it is susceptible of ownership, the owner may transfer it during his lifetime or upon his death via will or trust. If he fails to do so, the laws of intestate devolution will transfer it for him upon his death. However, if the thing in question is not property, then it cannot be owned or transferred. As detailed in Part III, many digital items are properly classified as licenses by the OSPs’ TOS and are not owned or susceptible of transfer by the decedent. Therefore, Louisiana should bifurcate the concepts of ownership and heritability when it comes to a person’s digital footprint.

As to ownership, existing state and federal property and intellectual property law should be used to determine whether a specific digital item is property. Thus, if current law would classify an item as property, then its status should not be affected by its storage in digital form. For example, a photograph would be considered property whether it has been developed and printed or whether it is still stored in digital form. Under this approach then, some digital items would qualify as property, but others would not. For example, those digital items that are, per the TOS, simply licenses would not be classified as property. Additionally, digital items should be classified individually, such that one digital item may be classified differently than the digital item on which it is stored. For example, a picture uploaded onto a photo-sharing website would be classified as property under federal copyright and state property law, but the account on which it is stored would not.

Using current property law in isolation would affect no change to the digital footprint dilemma and would result in some digital items dying with the decedent. Thus, laws on the heritability (i.e., susceptibility of transfer) of digital items are needed. Obviously, a digital item that qualifies as property is heritable. After all, “[t]he right

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339. See VA. CODE. ANN. § 64.2-109 (Westlaw 2014); S.B. 131, 2013 Reg. Sess. (Nev. 2013).

to own and pass on property at death has been a vital property right in the U.S. legal system for hundreds of years and should not be destroyed by the digital nature of assets.<sup>340</sup> However, even digital items not qualifying as property under current law, but instead classified as something else (like a license), should be heritable. Providing otherwise, as is the case under current law, is unfair. As one scholar noted, “[W]hen you die, no one tears down your real life house or burns your paper letters, but with virtual worlds and online services, the service provider may delete your account, your online house, your virtual goods, your electronic files, and your mail.”<sup>341</sup>

Of course, providing for the heritability of all digital items violates some TOS. However, “boilerplate provisions (often not even read by users) should be barred from rewriting probate laws that would otherwise govern whether a particular asset is inheritable.”<sup>342</sup> Louisiana already has one piece of legislation in place to aid its efforts. Louisiana Civil Code article 7 provides that persons may not, by contract, derogate from laws enacted for the protection of the public interest.<sup>343</sup> Louisiana could specify that its digital footprint statute is enacted “for the protection of the public interest.” Additionally, amending the conflicts articles as suggested above would further bolster the status of the Louisiana digital footprint statute. The combination of these pronouncements would negate any non-transferability provisions in TOS by making them void *ab initio*. Not only would this aid in the orderly administration of successions, but “[f]rom a business standpoint, supporting transferability upon death might lead to more continuous and stronger client relationships.”<sup>344</sup> However, while all digital items should be susceptible of transfer, not all digital items should necessarily be transferred in all situations. Instead, Louisiana should legislate their fate as follows.

First, Louisiana should follow the approach employed by Oklahoma, Idaho, Nevada, and the Act and respect the wishes of a testate decedent by specifying that any provisions in his will addressing digital items should be honored. This includes any denial by the decedent of access to his digital footprint. Unlike current statutes that are silent on the issue, Louisiana should specifically respect the wishes of a decedent who grants access to someone other than the executor of his will; in fact, Louisiana should respect the designations of different persons to access different digital items. Additionally, the decedent

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340. Hopkins, *supra* note 4, at 241. See also Sherry, *supra* note 13, at 188.

341. Wu, *supra* note 10, at 4.

342. Tarney, *supra* note 43, at 793. See also Darrow & Ferrera, *supra* note 127, at 314 (discussing the issue in the context of e-mail).

343. LA. CIV. CODE art. 7 (2014).

344. Hopkins, *supra* note 4, at 226.

should be allowed to provide his wishes in a juridical act other than a will. Louisiana is known for its hyper-formal approach to testaments, and a decedent leaving instructions for his digital footprint in a will risks having his wishes disregarded due to a form problem. That said, the law must also protect against unauthorized access to a decedent's digital footprint. Thus, Louisiana's statute should allow for a decedent's wishes to be contained either in a valid testament or juridical act solemnized by a notary who is not granted access to a decedent's digital footprint.

However, the decedent who dies without planning for his digital estate presents bigger challenges. In such a case, the question arises as to how the decedent would have wanted his digital footprint handled at death, and competing policies must be considered and weighed appropriately. As discussed in Part II, whether to allow access to a decedent's digital footprint triggers a variety of interests, some of which weigh in favor of and some of which weigh against access. Policies such as efficient estate administration, as well as the grieving and closure interests of those left behind and societal interests in preserving history, suggest that access should be granted. Conversely, the privacy rights of the decedent and those with whom he communicated and the contractual relationship between the decedent and the OSP dictate against access.

Most of the other statutes addressing the digital footprint issue employ a "one-size-fits-all" approach. That is to say, if the statute's requirements are satisfied, it grants access across the board. If the statute's requirements are not satisfied, it denies access across the board. Yet, given the variety of existing digital items, access should not be granted or denied in blanket fashion because different digital items can trigger different combinations of the competing interests to different degrees. It would seem that "the reasonable man" may have wanted his various digital items treated differently. For example, he may have no problem with those left behind accessing his eBay account or his online banking account. He may have a big problem with those same people accessing and reading all of his e-mails or logging in to see everything in his Facebook inbox. Recognizing the unique nature of different digital items, Louisiana's statute should tailor its rules on access to the particular digital item in question.

The statute should begin with a deep-seated respect for the decedent's privacy rights. In order to facilitate those rights, its starting point should be a presumption against access to the decedent's digital footprint. However, the statute should also recognize that other interests (besides the decedent's privacy) are triggered by the digital footprint situation.<sup>345</sup> In order to balance those competing interests, the

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345. See *supra* Part II.

presumption against access should be a rebuttable one, and the statute should allow for an interested person to gain access to a decedent's digital item by showing by clear and convincing evidence that he has good cause for access. For example, perhaps a decedent has left behind a business, and his customer lists and orders are stored in an online document management system. In such a case, his successor to that business should be able to show good cause for accessing the digital item in question. Or maybe the decedent's wedding photographs have been stored in an online photo site. His spouse should satisfy the good cause requirement for wanting to access that particular digital item. Adopting a "good cause" standard would allow for some judicial flexibility, while requiring clear and convincing evidence of that good cause would serve to weed out frivolous requests.

While this rebuttable presumption model will allow for equitable results as to most digital items, the statute should also recognize that it may not be the best and most targeted approach for all digital items. Instead, two types of digital items should receive different treatment under the statute. One of them is e-mail; the other is the digital items with monetary value.

E-mail is a unique digital item that deserves tailored treatment. As mentioned in Part I, e-mail serves as the master key to other digital items because access to a decedent's e-mail account could lead to the discovery of other digital items. Some of those digital items could be things like bank accounts or other assets that stand to increase the value of the decedent's patrimony and, as a result, the value of the successors' inheritance. Thus, if the decedent's e-mail account would reveal the existence of financially valuable assets, the successors have a strong interest, from an estate administration standpoint, in accessing that e-mail account. Of course, an e-mail account could also contain information that could be damaging to the posthumous reputation of the decedent and to other people. As such, e-mail is a unique digital item that lies at the intersection of two very compelling policies, and the Louisiana statute should therefore not subject a decedent's e-mail account to any presumption against or in favor of access. A presumption either way would be unfair. Instead, one wanting to know the contents of a decedent's e-mail account should have to petition the court for it. However, given the very real and heightened dangers associated with the contents of a decedent's e-mail account, the court should not simply grant or deny access to a decedent's e-mail account. Instead, a decedent's e-mail account should be subject to *in camera* review in which the person reviewing the e-mail account does so solely to look for the existence of other digital items. Of course, such a review would be time-consuming and administratively burdensome. To ease the burden on the judiciary, an independent third party, such as a special master or court-appointed attorney, could conduct this review. Of



course, that person would be compensated for his time and effort, which could be expensive. Therefore, the person petitioning the court for the *in camera* review should be responsible for the costs associated with the review.<sup>346</sup> Allocating costs this way should discourage people from seeking review unless they have a good faith belief that other digital items of value (from a financial or sentimental standpoint) will be located.

Digital items with monetary value should also be treated differently. For these digital items, the successors have a very strong interest in access. This is because digital items with monetary value will increase the value of the decedent's patrimony and, in turn, increase the value of the successor's inheritance. On the contrary, the privacy interests are weak. Although it is theoretically possible that digital items with monetary value could contain damaging information, it is far less likely than in the e-mail situation. Given this balance of interests, a presumption against access is inappropriate. Instead, one petitioning for access to these digital items should first have to prove that the digital item in question does, in fact, have monetary value. Assuming that threshold is cleared, anyone opposing access should be heard, and the judge should balance the estate administration interests against the privacy interests of the decedent. In doing so, he should first consider the likelihood that the digital item in question will contain any of the decedent's private information. Given the low risk of this, *in camera* review by an independent third party should not be required. The judge should then consider the digital items' monetary value to the successors. Only where he decides that the monetary value to the successors is likely to outweigh the privacy interests of the decedent and others should he grant access.

If and when access is granted, the concept of access should be clearly delineated in the statute. Thus, Louisiana should not follow the approach of Connecticut, Rhode Island, and Indiana by providing for "access to or copies of" the digital material. Instead, Louisiana should follow the approach of Oklahoma, Idaho, and the Act and allow for the one accessing a decedent's digital footprint to be allowed to access, control, conduct, continue, manage, deactivate, and delete the account in question. In essence, like under the Virginia statute, the administrator should be allowed to step into the shoes of the decedent and assume the digital item in question.

The Louisiana statute should also include some procedural safeguards. For example, it should contain a provision requiring proof of death. Like the statutes in Connecticut, Rhode Island, and Virginia, Louisiana legislation should require a person seeking a decedent's digital footprint to provide to the OSP a written request, along with (1) a

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346. Tarney, *supra* note 43, at 799.

copy of the death certificate and a copy of the decedent's grant of authority to the person requesting or (2) an order of the court of probate that, by law, has jurisdiction over the decedent's estate. It should also require that those seeking access to a decedent's digital footprint do so within a specific time frame. This would encourage timely resolution of the issue and would also facilitate the speedy resolution of successions. The statute should also provide that if access is not sought in a timely fashion, the OSP can delete the decedent's account (as long as it backs it up). Finally, like the Rhode Island and Virginia statutes and the Act, the Louisiana statute should provide indemnity for OSPs, and similar to the Idaho statute, it should impose an obligation of good faith upon anyone granted access to a digital asset.

#### CONCLUSION

A decedent's digital footprint is a topic that is complicated and constantly evolving. As the number of available digital items and the number of people using them continue to grow, the importance of the topic will likewise grow. The topic triggers numerous conflicting policies and numerous legal issues in numerous areas of substantive law. The current approach, i.e., estate planning, does not fully resolve the issues presented—neither do suggested solutions like an *ad hoc* approach, company changes, a federal statute, state statutes, or a uniform law. What is needed is the one-two punch of federal and state action.

Existing federal legislation must be amended to prevent inadvertent criminal and civil liability by those left behind. States must then legislate the fate of a decedent's digital footprint. Louisiana's statute should address the conflict-of-laws issues and define the relevant terms in a way that will evolve as technology does. It should also bifurcate concepts of ownership and heritability, such that the transfer of all digital items is possible. That said, the statute should respect a testator's desire not to transfer them and should specifically provide that the statute itself is enacted in the public interest, so that OSPs' TOS will not bar transferability. The statute should also comply with any and all testator decisions with regard to his digital footprint, but in the event that a decedent dies intestate or without instructions, Louisiana should avoid the "one-size-fits-all" approach followed in existing legislation. Instead, it should consider the strength of interests triggered by different digital items and enact legislation that appropriately reflects that consideration by treating different digital items differently. In the event that access is granted per the statute, it should provide for broad powers. It should also demand a proof of death, set time limits, and provide indemnity for the OSP. Technology is not going to slow down, but enacting proactive, comprehensive legislation such as that recommended in this Article would allow Louisiana to avoid being left behind.